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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

AT THE MARCH TERM, 1897, OF THE FIRST DISTRICT, AT THE MAY TERM
1897, OF THE SECOND DISTRICT, AT THE MAY AND NOVEMBER
TERMS, 1896, AND THE MAY TERM, 1897, OF THE THIRD
DISTRICT, AND AT THE FEBRUARY AND AUGUST
TERMS, 1897, OF THE FOURTH DISTRICT.

VOL. LXXI

REPORTED BY
MARTIN L. NEWELL
COUNSELOR AT LAW

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THE APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

FRANCIS ADAMS, Ashland Block, Chicago, Illinois.

NATHANIEL C. SEARS, " " " "

THOMAS G. WINDES, " " " "

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Columbus C. Duffy, Ottawa, Illinois.

JUSTICES.

JOHN D. CRABTREE, Dixon, Illinois.

DORRANCE DIBELL, Joliet, "

FRANCIS M. WRIGHT, Urbana, "

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield, Illinois.

JUSTICES.

OLIVER A. HARKER, Carbondale, Illinois.

BENJAMIN R. BURROUGHS, Edwardsville, Illinois.

JOHN J. GLENN, Monmouth, Illinois.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Frank W. Havill, Mount Vernon, Illinois.

JUSTICES.

JAMES A. CREIGHTON, Springfield, Illinois.

NICHOLAS E. WORTHINGTON, Peoria, "

HIRAM BIGELOW, Galva,

CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBARTS, Cairo, Illinois.
OLIVER A. HARKER, Carbondale, "
ALONZO K. VICKERS, Vienna, "

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon, Illinois.
PRINCE A. PEARCE, Carmi, "
ENOCH E. NEWLIN, Robinson, "

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville, Illinois.
MARTIN W. SCHAEFFER, Belleville, "
WILLIAM HARTZELL, Chester, "

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia, Illinois.
TRUMAN E. AMES, Shelbyville, "
SAMUEL L. DWIGHT, Centralia, "

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

HENRY VAN SELLAR, Paris, Illinois.
FERDINAND BOOKWALTER, Danville, "
FRANK K. DUNN, Charleston, "

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana, Illinois.
EDWARD P. VAIL, Decatur, "
WILLIAM G. COCHRAN, Sullivan, "

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield, Illinois.
ROBERT B. SHIRLEY, Carlinville, "
OWEN P. THOMPSON, Jacksonville, "

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy, Illinois.
HARRY HIGBEE, Pittsfield, "
THOMAS N. MEHAN, Mason City, "

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth, Illinois.
 GEORGE W. THOMPSON, Galesburg, "
 JOHN A. GRAY, Canton, "

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria, Illinois.
 THOMAS M. SHAW, Lacon, "
 NICHOLAS E. WORTHINGTON, Peoria, "

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington, Illinois.
 GEORGE W. PATTON, Pontiac, "
 JOHN H. MOFFETT, Paxton, "

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet, Illinois.
 ROBERT W. HILSCHER, Watseka, "
 JOHN SMALL, Kankakee, "

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa, Illinois.
 HARVEY M. TRIMBLE, Princeton, "
 SAMUEL C. STOUGH, Morris, "

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva, Illinois.
 WILLIAM H. GEST, Rock Island, Illinois.
 FRANK D. RAMSEY, Morrison, "

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon, Illinois.
 JAMES SHAW, Mount Carroll, "
 JAMES S. BAUME, Galena, "

Sixteenth Circuit.—The counties of Kane, DuPage, DeKalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin, Illinois.
 CHARLES A. BISHOP, Sycamore, Illinois.
 GEORGE W. BROWN, Wheaton, "

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford, Illinois.
 CHARLES E. FULLER, Belvidere, Illinois.
 CHARLES H. DONNELLY, Woodstock, Illinois.

COURTS OF COOK COUNTY.

The State constitution recognizes Cook county as one judicial circuit, and establishes the Circuit and Superior Courts of said county. The Criminal Court of Cook County is also established with jurisdiction of a Circuit Court in criminal cases only. The judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cook, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANEY,
OLIVER H. HORTON,

JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—Stephen D. Griffin, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,
THEODORE BRENTANO,
PHILIP STEIN,
WILLIAM G. EWING,
JONAS HUTCHINSON,
JAMES GOGGIN,

ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
JOHN BARTON PAYNE,
NATHANIEL C. SEARS,
FARLIN Q. BALL,
JOSEPH E. GARY.

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FIRST DISTRICT—MARCH TERM, 1897.

**Atlas Furniture Company v. E. S. Higgins Carpet
Company.**

1. **MEASURE OF DAMAGES—***For Defects in the Quality of Goods Sold.*—Where goods sold prove not to be of the quality bargained for, the purchaser is entitled to recover the difference between the contract price and the market value of the goods at the time and place of delivery.

2. **INSTRUCTIONS—***Error Without Injury.*—A party to a suit can not complain, on appeal, of the giving or refusal of instructions on an issue upon which the jury found in his favor, as the verdict is conclusive that he was not harmed.

Assumpsit, on a promissory note and on the common counts. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed August 5, 1897.

ALBERT N. EASTMAN, attorney for appellant.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This suit was brought partly upon promissory note, and partly upon open account to recover the purchase price of carpets sold by appellee, a manufacturer, to appellant a retailer.

The defense was breach of warranty as to quality of goods sold.

The amount sued for, the contract price of the goods, was \$1,398.04. The verdict rendered by appellee was for \$900 only. It is thus apparent that the jury found upon the issue of warranty and breach thereof in favor of appellant.

The only complaint of appellant is, in substance, that the damages awarded for such breach of warranty were inadequate.

The points, as presented to the trial court upon appellant's motion for a new trial, and considered here as assignments of error, are:

1st. That the amount of the verdict is not supported by the evidence.

2d. That defendant's (appellant's) refused instructions, numbers 2 and 3, should have been given.

3d. That plaintiff's (appellees) second instruction should not have been given.

The evidence presented by appellant to establish damages resulting from breach of warranty, was perhaps sufficient to support the conclusion of the jury as to inferior quality of the goods, but was lacking in any definiteness as to amount of damages resulting.

A portion of the goods were returned to appellant by its customers. Warren C. Noyes testified that of one shipment, 720 yards of carpet were returned by customers. Much complaint is made of loss of trade by reason thereof; but aside from this speculative damage there is scant evidence as to how much in dollars and cents appellant was damaged.

Johnson testified that the carpets were of no value "to our trade."

Warren Noyes testified that there is no market value for such carpets, and said, "We could use all that came back but we got very little for them."

How much appellant received for them is nowhere disclosed.

He also testified that "speaking of their relative value

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as they came to the office first and when they came back " (returned by customers), the value was about one-third.

Charles Noyes testified that they were not worth anything "to our house."

Moran testified that carpets, such as the one exhibited to him, would not have any value.

There was testimony that one of the worst of the carpets in question, after having been returned by a customer, was sold at thirty cents per yard. What the purchase price of that particular carpet was, when sold to appellant, does not appear.

From such evidence the jury could not accurately measure the damage.

If the appellee complained here of the lack of definite evidence to support the award of damages by the jury for breach of warranty, we would be compelled to seriously question its sufficiency. But appellant, if it has received that which was not warranted by the evidence and has been deprived of nothing to which it was entitled under the evidence, can not be heard to complain.

The second instruction for appellant refused, related only to the issue of warranty and breach thereof. Upon that issue the jury found for appellant, and hence no prejudice could have resulted to it from the refusal.

The third instruction presented by appellant, and refused, incorrectly states the rule as to measure of damages, in that it substituted actual worth at the time of purchase for market value at time and place of delivery. *Carpenter v. First Nat'l Bank*, 119 Ill. 352.

The second instruction given for appellee can not be complained of, for it relates only to the issue of warranty and the verdict is conclusive that appellant was not harmed.

No error is presented which could have worked prejudice to appellant.

The judgment is therefore affirmed.

Montgomery Ward & Company v. American Trust & Savings Bank.

1. **POSSESSION—Secured by Agreement Does Not Operate to Perfect a Defective Title.**—A and B having receipts of an alleged warehouseman for the same property, A sued out a writ of replevin upon which a paper levy was made, actual possession of the goods not being secured. An agreement was then made that the property should be removed to another county and delivered to A, and that B should institute a replevin suit in which the controversy should be determined. *Held*, that A acquired no superior right or claim by what took place under this arrangement, that his possession secured under it did not tend to perfect his title under his receipt, and that the rights of the parties must be determined with reference to the facts as they stood before the agreement was made.

2. **WAREHOUSE RECEIPTS—For Goods Not In Esse.**—A warehouse receipt is of no validity as to goods not *in esse* at the time it is given.

3. **SAME—Holder of Senior Receipt Entitled to Preference.**—As between two persons holding warehouse receipts for the same goods the one holding the receipt of prior date is entitled to the goods.

4. **SAME—Issued by Persons Not Public Warehousemen.**—The possession of a warehouse receipt for merchandise, although issued by one not a public warehouseman under the statute, is by custom, at least as to articles difficult of delivery, equivalent to the possession of the property itself. The issuance of such a receipt amounts to a symbolical delivery of the goods described in it and possession of it is equivalent to the possession of the goods described so far as they are *in esse* when the receipt is given.

5. **SALES—Vendor Must have Title.**—It is a general rule of law, sanctioned by common sense, that no man can by his sale transfer to another the right of ownership of a thing wherein he himself has no right of property.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed August 5, 1897.

MERRICK, EVANS & WHITNEY, attorneys for appellant.

The change in possession of the goods in question on or before June 25th and August 12th, respectively, from the Foundry & Machine Company to the Light & Power Company, together with the delivery to appellant of the warehouse receipts of June 25th and August 12th, respectively,

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was good against all subsequent purchasers and creditors of the Foundry & Machine Company. Benjamin on Sales, *p. 302; Rohde v. Thwaites, 6 B. & C., 388; Burton v. Curyea, 40 Ill. 320; Leonard v. Dunton, 51 Ill. 482; Broadwell v. Howard, 77 Ill. 305; Wilson v. Pearson, 20 Ill. 81; Statute of Frauds, Sec. 5.

After appellant had procured the change of possession of the goods in question from the Foundry & Machine Company to the Light & Power Company, both being separate and distinct corporations, duly organized under the laws of the State of Illinois, its title to such property could not be affected by any subsequent connivance or collusion between said corporations unless the same is brought to the knowledge of appellant. Statute of Frauds, Sec. 5; Ewing v. Runkle, 20 Ill. 449; Reynolds v. Patterson, 4 Ill. App. 183; Seaton v. Ruff, 29 Ill. App. 235; Brown v. Riley, 22 Ill. 45; Bowden v. Bowden, 75 Ill. 143; Wright v. Grover, 27 Ill. 426; Powers v. Green, 14 Ill. 386; Read v. Wilson, 22 Ill. 377.

The warehouse receipt of July 17th to appellee is void. Burton v. Curyea, 40 Ill. 320; Montague v. Ficklin, 18 Ill. App. 99; Tiedeman on Sales, Sec. 318; Lickbarrow v. Mason, 1 Smith Leading Cases, Pt. 2, 1197; *Nemo dat quod non habet*, Broom's Maxims, 455.

This case is governed by the rules of law relating to warehouse receipts and the passing of title to property thereby. Rev. Stat., Chap. 114, on Warehouses, Secs. 2 and 24; Broadwell v. Howard, 77 Ill. 305; Smith's Lead. Cases, Vol. 1, Part 2d (7 Am. Ed.), 1197; Western Union R. R. Co. v. Wagner, 65 Ill. 197; Northrop v. First Nat. Bank, 27 Ill. App. 527, 529.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

This was an action of replevin brought by appellant, the contest in which was as to the right to the possession of and title to certain agricultural implements claimed by each

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of the parties hereto, under different warehouse receipts to them respectively issued.

On April 11, 1896, the Sycamore Foundry & Machine Company, a corporation doing business at Sycamore, DeKalb County, Illinois, obtained from plaintiff an order for the manufacture of various agricultural implements. The goods were to be properly stenciled with the name of Montgomery Ward & Company, and to be ready and paid for September 1, 1896. It was evidently in the contemplation of the parties to such order, that at least a portion of the goods might be ready for shipment and shipped prior to September 1st.

Early in June, 1896, the Sycamore Foundry & Machine Company requested appellant to take the portion of the goods then manufactured, and pay cash therefor, and in consideration of a discount, appellant agreed to take and pay cash for the goods then manufactured, provided the Foundry & Machine Company would, at its expense, place the same in the possession of a third party, and have such third party issue a warehouse receipt therefor, and would procure insurance on the goods for the benefit of appellant.

On June 25, 1896, the Sycamore Foundry & Machine Company delivered to appellant a warehouse receipt from the Sycamore Light & Power Company, also a corporation doing business at Sycamore, and at the same time the Foundry & Machine Company delivered to plaintiff two policies of insurance, covering the goods in question, loss payable to the Foundry & Machine Company and appellant, as their interests might appear.

Appellant about that date paid for the goods mentioned in the said warehouse receipt, the price agreed upon in the order for their manufacture, less a discount allowed to it by reason of its advance payment.

About the 12th of August, 1896, the balance of the goods mentioned in the original order were completed, and in pursuance of the agreement to take them upon completion, appellant paid for the remainder of the goods on August 13th and 14th, and received for them from the Sycamore

Foundry & Machine Company a warehouse receipt made by the Sycamore Light & Power Company, and also a policy of insurance, loss payable, like the previous one, to appellant and the Sycamore Foundry & Machine Company, as their interests might appear.

On May 14, 1896, Harvey S. Hayden, then the president of the Foundry & Machine Company, applied to appellee for a loan of \$2,500 to meet the pay-roll of the Foundry & Machine Company due the next day. Thereupon appellee loaned \$2,500 on the note of Hayden Brothers. The proceeds of this loan were immediately turned over to the Foundry & Machine Company. This note of Hayden Brothers matured June 1st, and was then renewed for thirty days; at the maturity of that note, it was renewed until July 20th.

Frank C. Patten was at this time the vice-president of the Foundry & Machine Company, and also one of the directors of the Light & Power Company. He and Hayden arranged that Hayden should endeavor to obtain from appellee \$1,500 as an additional loan, and also an extension of the \$2,500 note of Hayden Brothers until September 1st, and that to do so the order for goods to be manufactured, given by appellant April 11, 1896, together with a warehouse receipt for the goods covered by that order, should be given to appellee as security. Thereupon Hayden took the order made by appellant, April 11th, and procured from appellee an additional loan of \$1,500, and an extension of the loan of \$2,500 to September 1st, on the note of Hayden Brothers, that being the date when the goods covered by the order of appellant were to be paid for. This additional loan and the extension were made by appellee on condition that the order of April 11th, made by appellant, and a warehouse receipt for the goods covered by that order, and fire insurance policies covering these goods, should be delivered to appellee as security for said loan, and on July 17, 1896, this was done, the Light & Power Company issuing the warehouse receipt. A few days prior to August 29, 1896, an execution for a small amount, against the Sycamore

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Foundry & Machine Company, was placed in the hands of the sheriff of DeKalb county, and the sheriff made a paper levy on the goods in controversy in this suit, but did not take actual possession of said goods. On August 29, 1896, the Sycamore Foundry & Machine Company made, in the County Court of DeKalb County, a voluntary assignment for the benefit of its creditors. On September 2, 1896, appellee sued out a writ of replevin against the sheriff, describing in the writ the goods in controversy in this suit, covered by its warehouse receipt, given to it as aforesaid.

On September 2, 1896, it placed said writ of replevin in the hands of the coroner of DeKalb County, who also made a paper levy, and served it by reading, but did not take actual possession of the goods.

A few days thereafter the attorney for appellant called upon the president of appellee, and after some negotiations, stipulated with the attorneys for appellee that steps should be taken to remove any liens existing in favor of the execution creditors at Sycamore, or in favor of the assignee, if any, and for an arrangement for having the goods sent to Chicago, so that the right of property as between the parties might be tried in Chicago. This resulted in the writing, by the attorneys for appellee to their correspondents at Sycamore, who had immediate charge of the replevin suit there brought on behalf of appellee, of the following letter:

“CHICAGO, Oct. 7, 1896.

Messrs. Jones & Rogers, Sycamore, Ill.

DEAR SIRS: As we are virtually in possession of the property in controversy between the American Trust & Savings Bank and Montgomery Ward & Company, and as it is desired by us as well as by Mr. Merrick, attorney for Montgomery Ward & Company, that whatever litigation, if any, there may be between us, as to the right of property, shall be conducted in Cook county, we have come to this understanding: The property replevied by us shall be turned over to Mr. Jennison on behalf of the American Trust & Savings Bank, you to obtain an order from the

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County Court permitting the assignee to turn it over, the replevin writ to be returned "No property found." The goods are to be shipped here at once to the American Trust & Savings Bank by Mr. Jennison, so that if Montgomery Ward & Company desire to replevy the same from us, they may be able to do so here without delay, that the case may be tried here.

By kindly carrying out these instructions strictly you will oblige,

Yours very truly,

MORAN, KRAUS & MAYER.

P. S. We understand that the execution and attachment creditors make no claim to the goods. We also prefer to litigate with Montgomery Ward & Company here.

M., K. & M."

The attorney for appellant and an agent of appellee then went to Sycamore, obtained an order from the County Court releasing any claim of the assignee, made an arrangement with reference to the shipping of the goods to Chicago, which upon their arrival here were delivered to appellee; whereupon appellant demanded from appellee the goods, which demand being in writing was refused; appellant brought a replevin suit in Cook County for said goods.

The question of fact involved in this case is: Did the Sycamore Foundry and Machine Company, the manufacturer of the goods upon the order of appellant, part with the possession of the goods under any arrangement by it made with appellant? Appellant claims that the goods in question were by the Sycamore Foundry & Machine Company delivered to the Sycamore Light & Power Company as a warehouseman, and that such last named company, as such warehouseman, issued its warehouse receipts for such goods, and that such receipts were given to appellant upon its paying for such goods; and that thereby such goods were, by the Light & Power Company, held in trust for appellant, to be surrendered to it upon the production of such warehouse receipts.

Appellee claims that the Sycamore Foundry & Machine

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Company never parted with such goods; that while the Sycamore Foundry & Machine Company and the Sycamore Light & Power Company were technically distinct corporations, yet in reality they were one and the same, the Light & Power Company being a mere creature and dependent of the Foundry & Machine Company, and that appellee not having notice of any of the rights claimed by appellant, obtained the warehouse receipt given to it, appellee, July 17, 1896, upon a loan to the Sycamore Foundry & Machine Company of the sum of \$4,000, and that thereafter the actual custody and possession of said goods never having been taken from said Sycamore Foundry & Machine Company, or, if taken, being in the custody of the sheriff of DeKalb county, under the execution against the Foundry & Machine Company to said sheriff delivered, it, appellee, sued out its writ of replevin for said goods, and placed the same in the hands of the coroner of DeKalb county. Appellee claims that thus it became virtually in possession of said goods, and that appellant, recognizing this, and both parties desiring that the litigation as to the right to the possession of said goods should be conducted in Cook county, an arrangement between appellant and appellee was made by which said goods were brought to this county and delivered to appellee; and the question as to their respective rights was to be settled by a replevin suit in Cook county, pursuant to which arrangement this suit was begun.

The Circuit Court of this county, in which this action was brought, a jury having been waived, found that appellee was entitled to the custody of such goods, which finding may be justified only under the conclusion, if such there was of the court, that while none of the warehouse receipts were good as against *bona fide* creditors or purchasers of the Foundry & Machine Company, that appellee, under its right as against the Foundry & Machine Company to the possession of such goods, obtained actual possession of the same, and thereby, made its claim, which theretofore was good only as against the Foundry & Machine Company, good as against all the world, to the extent of its lien to secure the payment of the loan of \$4,000 by it made.

It can not be disputed but that appellant had, as against the Foundry & Machine Company, by its advance payment for the goods, become entitled to the possession thereof. The contest in this case is not as to the rights of the Foundry & Machine Company as against appellant, but as to the rights of one of its creditors, who obtained a right of possession of said goods as against the Foundry & Machine Company, as against appellee; which right, it has been found by the Circuit Court, appellee perfected as against all the world by obtaining the actual possession of such goods, by agreement with appellant, however, and for the very purpose, in this suit, of settling the conflicting rights of appellant and appellee.

That contention can not be maintained. The rights of appellant and appellee, all claims of the assignee of the Foundry & Machine Company, and of the sheriff under the execution against the Foundry & Machine Company having been released, must be determined on the basis on which they stood October 7, 1896, when the letter of appellee's counsel of that date was written, in which it is stated the goods in question were then in controversy between appellee and appellant, and pursuant to which and arrangements with appellant's counsel, the goods were shipped to Chicago. Appellee and appellant under this arrangement joined in a petition to the County Court of DeKalb county, in which it is stated they both claimed the property; the County Court so ordered and directed the assignee not to interfere with the possession of the property; the replevin writ in favor of appellee was returned "no property found," and thereafter representatives of appellee and appellant acting together had the goods shipped to Chicago, appellant's counsel agreeing to pay the freight.

It needs no citation of authority to show that appellee acquired no superior right or claim by what took place under these amicable arrangements. Prior to these arrangements, neither appellee nor appellant had the actual, or any possession of the goods, unless the possession of the Light & Power Company was such possession—that is, unless

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the issuance of the warehouse receipts, coupled with the transactions of the parties, was a symbolical delivery of the goods, or the actual possession passed from the Foundry & Machine Company to the Light & Power Company, by virtue of the transactions between the several parties and what took place with reference to the goods themselves, thus making the Light & Power Company the bailee for appellee or appellant.

The evidence in the record shows that the goods described in the warehouse receipt of June 25, 1896, had been completed and were in the warehouse, the title of which was in the Light & Power Company prior to that date, and were on that date or before paid for by appellant.

On July 17, 1896, what goods had been completed and placed in this warehouse, besides the goods described in the receipt of June 25, 1896, is not clear from the evidence, but there is evidence tending to prove that some of the goods described in appellee's receipt, not covered by the receipt of June 25, 1896, were completed and in the warehouse at the time appellee's receipt was given. The evidence is also clear that when appellant received its receipt of August 12, 1896, all the goods described in it had theretofore been completed and placed in the warehouse. Appellee's receipt covers all the goods contained in both appellant's receipts.

Art. 13, Sec. 1 of the Constitution, declares, "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

Ch. 114, Sec. 1, divides public warehouses as defined by the Constitution, into three classes, A, B and C, and it is conceded that if the warehouse of the Light & Power Company is a public warehouse, it comes under Class C, which is stated by the statute (Sec. 2), "shall embrace all other warehouses or places where property of any kind is stored for a consideration."

Both the Constitution and the statute clearly contemplate that no place of storage shall be considered a public ware-

house, unless it be conducted by one in the business of receiving goods for storage for a consideration.

It is conceded that under its charter the Light & Power Company was not authorized to do a storage business, and that it in fact did not engage in that business as a business, nor is it shown that it at any time received goods for storage for a consideration, unless that may be inferred from the receipt of appellee, which contains the words "upon the surrender of this certificate and payment of charges."

We are therefore of opinion that the warehouse of the Light & Power Company was not a public warehouse within the meaning of the laws of this State, and that the receipts of both appellant and appellee are of no more validity or binding force, so far as giving title to the holder thereof is concerned, than the receipt of any private individual. But if these receipts are warehouse receipts within the meaning of the statute, then the receipt of appellee is of no validity, to the extent of the goods not *in esse* at the time it was given, and as to the goods contained in it, and also in the prior receipt of June 25, 1896, held by appellant, would not be good as against appellant. Union Trust Co. v. Trumbull, 137 Ill. 146-173.

Appellant holds two receipts, which on their face state the goods are "held subject to the order of Montgomery Ward & Co. only." Appellee's receipt shows the receipt of goods from the Foundry & Machine Company deliverable to its order, and indorsed in blank by the Foundry & Machine Company. A part of the goods described in the receipt were not in existence when the receipt was given, and as to these it must be a nullity.

As appellee got no possession of the goods, nor any right to their possession superior to appellant by virtue of its loan of money, it has no claim, at least to the goods for which appellant paid, on June 25, 1896, nor as to those not in existence July 17, 1896.

In *Fawcett v. Osborn*, 32 Ill. 424, the Supreme Court said (and it is quoted with approval in the *Burton* case, *infra*): "We apprehend no well considered case can be found

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in the books, where a party has been deprived of his property without his consent, or where a party selling has been adjudged competent to convey to a purchaser a better title than he himself possessed.

The general rule of law, sanctioned by common sense, is, that no man can, by his sale, transfer to another the right of ownership in a thing wherein he himself had not the right of property," except in certain cases specified, not here applicable.

When appellant paid the money June 25, 1896, and the receipt of that date was given, it was the intention of both parties that the right of property should pass to appellant, and that without reference to whether the receipt was a valid warehouse receipt or not, and if the Light & Power Company did not become the bailee of appellant, the Foundry & Machine Company did, and it had no title which it could convey to appellee, under the circumstances shown in this case. *Burton v. Curyea*, 40 Ill. 332, and cases cited; *Fawcett v. Osborn*, 32 Ill. 424, and cases cited.

If the principle announced in the *Fawcett* case is law, it is immaterial in this case whether the Light & Power Company was the agent of the Foundry & Machine Company or not; the latter, by its dealings with appellant, rendered itself powerless to convey a good title to appellee—unless appellant had notice of a fraudulent intent of the Foundry & Machine Company, and that is nowhere contended or shown. The question in that connection is, which of two innocent persons, neither of whom got possession of the property, should suffer. Appellant had no notice but that the Light & Power Company was a wholly separate and distinct entity from the Foundry & Machine Company, which in law it was, however the fact may be, and is in no way to blame for the fraud, if there be fraud, of the Foundry & Machine Company in pledging the goods to appellee. We think that the Light & Power Company should be held, for the purposes of this case, the bailee of appellant, not the agent of appellee, and that the possession of the goods in question was held by the Light & Power Company for appellant,

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at least so far as concerns those described in the receipt of June 25, 1896, and those in the receipt of August 12, 1896, which were not *in esse* on July 17, 1896. Rev. Stats., Ch. 59, Secs. 4 and 5; Ewing v. Runkle, 20 Ill. 449-460; Brown v. Riley, 22 Ill. 45-51; Reynolds v. Patterson 4 Ill. App. 184; Seaton v. Ruff, 29 Id. 235.

But if this view should not be tenable, we think that while the receipts are not warehouse receipts, within the meaning of the statute, still they are an acknowledgment by the person giving them that he has received merchandise, and from whom and on whose account and usage, at least as to articles difficult of delivery, has made the possession of such documents equivalent to the possession of the property itself. They amount to a symbolical delivery of the goods described in them. The possession of these receipts was equivalent to the possession of the goods described in them, so far as the goods were *in esse* when the receipts were given. Lickbarrow v. Mason, 1 Smith's L. Cases, pt. 2, 1197; Western Union R. R. Co. v. Wagner, 65 Ill. 197; Spangler v. Butterfield, 6 Col. 356, and cases cited; Northop v. First Nat. Bk., 27 Ill. App. 529; Durr v. Hervey, 44 Ark. 306; Puckett v. Reed, 31 Ark. 131, and cases cited; Glasgow v. Nicholson, 25 Mo. 30; Waller v. Parker, 5 Cald. 476; Planters, etc., Co. v. Merchants, etc., Bank, 3 S. E. Rep. 328; Baltimore & Ohio R. R. Co. v. Wilkens, 44 Md. 11-27; Benjamin on Sales, Bk. 1, part 2, Secs. 172, *et seq.*

Inasmuch as the evidence fails to show that all the goods included in appellee's receipt of July 17, 1896, were in existence at that time, the cause is reversed and remanded for a new trial.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—FEBRUARY TERM, 1897.

East St. Louis Connecting Railway Company v. E. J. Eggmann, Adm'r.

1. APPELLATE COURT PRACTICE—*Errors not Argued Deemed Abandoned.*—An assignment of error which is not referred to in the briefs will be deemed abandoned and will not be considered by this court.

2. PRACTICE—*Motions for New Trial and in Arrest of Judgment.*—A motion for a new trial should precede a motion in arrest of judgment, and when a motion in arrest is first heard and determined it is presumed that the motion for a new trial has been abandoned.

3. SAME—*Waiver of Objections.*—Where no exception is taken to the overruling of an objection to evidence, at the time it was offered, the objection must be regarded as waived, and an instruction asking that the evidence be excluded from the consideration of the jury should be refused.

4. VERDICTS—*At What Time they May be Received.*—It is not error for the judge to receive the verdict of the jury in an interval between the adjournment of the court and the time set for it to meet again in pursuance of such adjournment. The reception of the verdict is a mere ministerial act.

5. NEGLIGENCE—*An Instruction in Regard to, Considered.*—An instruction in a personal injury case informing the jury that the defendant could not recover if he "had actual timely notice of the approach of the engine which struck him," was modified by adding "that is, sufficient notice to enable him to get out of the way by the exercise of ordinary care." *Held*, that the modification was properly made.

6. SAME—*A Question for the Jury.*—Whether the plaintiff in a personal injury suit was himself negligent, under the circumstances dis-

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closed by the evidence, is a question for the jury and not for the court to determine, and an instruction telling the jury that certain facts, if proved, amount to negligence may properly be modified so as to tell them that such facts should be considered in connection with the other evidence in the case in determining the question of negligence.

7. RAILROADS—*Ordinances Regulating Speed of Trains and Requiring the Ringing of a Bell.*—The fact that a person alleged to have been injured through the negligence of a railroad company, was an employe of such company, and was working in its private grounds at the time of the accident, does not exclude him from the benefits of a city ordinance regulating the speed of trains and requiring a bell to be rung constantly while a train is moving within the limits of the city.

Trespass on the Case.—Death from negligent act. Appeal from the City Court of East St. Louis; the Hon. Alonzo D. Wilderman, Judge presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed September 10, 1897.

CHARLES W. THOMAS, attorney for appellant.

JESSE M. FREELS and A. R. TAYLOR, attorneys for appellee.

MR. JUSTICE BIGELOW DELIVERED THE OPINION OF THE COURT.

This is an action on the case brought by appellee, in the City Court of East St. Louis to recover damages for the alleged negligence of appellant, in injuring and causing the death of Joseph F. Newland, appellee's intestate.

There is but one count in the declaration, and the negligence of the defendant alleged therein is, that while plaintiff's intestate was engaged in making a drain for defendant, under defendant's road-bed, in the city of East St. Louis, and while in the exercise of due care and diligence, defendant's engineer, in charge of its engine and freight cars, on the 19th day of October, 1891, negligently and carelessly ran said engine with great force and violence against and upon the said Joseph F. Newland, thereby inflicting such injuries to his leg and body that he died five days thereafter; that Newland was not a fellow-servant with defendant's servants in charge of the train; that an ordinance of the city of East St. Louis prohibited the

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running of said engine and cars within the limits of the city at a rate of speed exceeding six miles an hour, and further required the bell of such engine to be constantly rung while moving within the limits of the city; that said engine and cars were, at the time of the injury, being run at a speed exceeding six miles an hour, and that the bell of the engine was not rung.

Plaintiff recovered a verdict and judgment for \$3,500.

The case has been here twice before, and is reported in 58 Ill. App. 69, and 65 Ill. App. 345.

There is more and different evidence in the record now than in the first record, when the judgment of the court below, in favor of appellee, was reversed, because the verdict of the jury was against the weight of the evidence.

At the close of plaintiff's evidence in chief, the defendant moved the court to instruct the jury to find the defendant not guilty, which, being overruled, was again renewed, at the close of the evidence, with a like result, and defendant excepted.

The jury were instructed and retired early in the evening, when the court adjourned until 9 o'clock the following morning; but about 10 o'clock in the evening, the jury having agreed, the court reconvened, without the presence of the clerk, or defendant's counsel, and received the verdict of the jury; whereupon the court adjourned as before, and the jury separated. The defendant then filed a motion in arrest of judgment, which was overruled by the court, and the defendant excepted. The defendant then filed a motion for a new trial, which the court denied, and defendant excepted; and judgment having been rendered on the verdict, the defendant brings the case to this court by appeal, and assigns three errors, viz.: First, the overruling of the motion in arrest of judgment; second, the overruling of the motion for a new trial; third, the entry of judgment on the verdict.

Inasmuch as defendant's counsel has not, either in the principal or reply brief, referred to the first assignment of error, we are justified in supposing it has been abandoned. Had the defendant, after the entry of the order overruling

the motion in arrest of judgment, moved the court to strike the motion for a new trial from the files, doubtless it would have been sustained, as the latter motion should precede and not follow a motion in arrest, and when a motion in arrest is first heard and determined, it is presumed that the motion for a new trial has been abandoned. *Hall v. Nees*, 27 Ill. 411. Counsel for appellant, in his motion for a new trial, sets up eight reasons why the motion should have been sustained; but in the "Brief of the Argument" filed by him, only a few of them are noticed, hence we must presume those not noticed are abandoned, and we will consider only those that are noticed.

The first contention of appellant's counsel is, that the court erred in receiving the verdict of the jury as it did. It does not appear that defendant suffered injury in consequence of the action of the court. Nor does it appear that the jury were discharged for the term. If the court had kept the jury out until it convened the next morning, "without meat or drink, fire or light," as in *William Penn's* case, what good would it have done? The verdict was as safe in the possession of the court as it would have been had it been sealed and left in the possession of the foreman of the jury, as is the usual practice in civil cases. In the case of *Baxter v. The People*, 3 Gilman, 368, which was a capital case, it was held that the receipt by the court of the verdict of the jury on Sunday was a ministerial act, and so not error; and this was followed by *McIntire v. The People*, 38 Ill. 514 (another capital case), holding that it was not error to receive the verdict of the jury in the interval after the adjournment of court, and before convening again, as in this case. Certainly, if the act of receiving and entering the verdict of a jury in a capital case on Sunday, and also in the interval after the adjournment of court in the evening, and before it convenes next morning, are but ministerial acts, it does not seem possible that the act of receiving the verdict in this case, as was done, can be judicial; therefore it was not error.

It is further contended by appellant's counsel that the

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court should not have permitted sections 583 and 584 of the ordinance of the city of East St. Louis to be read to the jury. It is a sufficient answer to this contention that no objection was made to the introduction of the evidence, and so no question is before this court concerning it.

Objection is made to appellee's only instruction given to the jury, mainly for the reason that it assumes facts proven, instead of leaving them to the jury to find. This objection would be well taken if it were true, but it is not. The instruction is somewhat lengthy, and summarizes the facts necessary to be proven according to plaintiff's theory of his case as set forth in his declaration; and covering all the points in the case, of which there was any evidence, tells the jury that if they find from the evidence all of these several matters, they should find the defendant guilty, and assess the plaintiff's damages. Nothing is assumed to have been proven, but every necessary fact to make a case for the plaintiff, of which there was any evidence, was left to the jury to find.

Objection is made to the modification of appellant's instructions two and three, and also to the refusal to give instruction number seven. Instruction number two is as follows :

"2. The court instructs the jury that if they believe from the evidence that Newland had actual timely notice of the approach of the engine which struck him, whether such notice was received from a bystander, or from seeing and hearing the engine as she approached, then it makes no difference in that case whether the bell of the engine was ringing or whether she was running at a greater rate of speed than six miles on hour."

As modified and given to the jury by the court, the instruction is as follows :

"2. The court instructs the jury that if they believe from the evidence that Newland had actual timely notice of the approach of the engine which struck him, that is, sufficient notice to enable him to get out of the way by the exercise of ordinary care, whether such notice was received

by him from a bystander, or from hearing or seeing the engine as she approached, then it makes no difference in this case whether the bell of the engine was ringing or not, or whether she was running at a greater rate of speed than six miles per hour."

The modification simply informed the jury what the words "timely notice" meant, and without it the jury might have been misled.

Instruction number three as asked, is as follows:

"3. If the jury believe from the evidence that Newland was in defendant's employ as a carpenter, and as such was at work putting in a drain under defendant's tracks, at a place where defendant's engines and cars were accustomed to pass at frequent and irregular intervals, and that Newland was acquainted with the manner in which the engines were operated there, and when the engine which struck him was approaching him, and but a short distance from him, he was at the side of the track upon which the engine was moving, and was clear of the engine, and where he would not have been struck if he had not moved, and that he was warned of the engine's approach, and changed his position, or slid, or fell down, so that the engine struck him and caused his injury, then the plaintiff can not recover in this case."

The court struck out the last seven words of the instruction, and added the following: "These facts should be considered by the jury, in connection with all the other evidence in the case, in determining whether the said Newland was himself guilty of negligence which directly contributed to his injury; and if you believe from the evidence he was guilty of negligence which directly contributed to his injury, the plaintiff can not recover and your verdict in such case must be for the defendant."

The modification of the instruction saved all the supposed facts stated in it for the consideration of the jury, without telling them what the effect would be if they were proven, and this was all the defendant was entitled to. If Newland was negligent, and his negligence directly contributed to

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his injury, the plaintiff could not recover; but whether, under the circumstances disclosed by the evidence, he was negligent was a question for the jury and not for the court to determine, and in determining it the jury were properly instructed to take into consideration all of the evidence in the case bearing on the question.

Appellant's refused instruction No. 7 sought to exclude from the jury any consideration by them of the sections of the ordinances of the city of East St. Louis, given in evidence by appellee, in case the jury should find Newland was an employe of appellant, and at the time of the accident was working on its private grounds and not in any public street or place. As no exception was taken by appellant to the overruling by the court of appellant's objection to the evidence at the time it was offered, the objection must be regarded as waived. *E. St. L. Elec. St. R. Co. v. Cauley*, 148 Ill. 490; *E. St. L. Elec. R. Co. v. Stout*, 150 Ill. 9. The sections of the ordinances were relied on in plaintiff's declaration, as a ground for recovery, and even if an exception to their introduction had been saved by appellant, the instruction should have been refused. *St. L., A. & T. H. R. Co. v. Eggmann*, 161 Ill. 155; *I. C. R. R. Co. v. Gilbert*, 157 Ill. 355.

The only remaining contention of appellant is, that the verdict of the jury is against the evidence.

When the case was here the first time, and the judgment was reversed because the verdict of the jury was against the weight of the evidence, this court did not hold that there was an entire lack of evidence on the part of plaintiff. Had it so held, it would not have remanded the case for a new trial.

There is new and material evidence on the part of plaintiff in the record now, that was not introduced on the first trial, and while the evidence is conflicting, it is not our province to determine on which side it preponderates; but it is the duty of the jury to settle conflicting evidence, and having done so their verdict should stand, and the judgment on it will be affirmed.

Covenant Mutual Life Association v. Victoria C. Cox.

1. **INSTRUCTIONS—Ignoring the Issue Raised by the Pleadings.**—In a suit on an insurance policy, issue was joined on the question whether the insured had made false representations as to the state of his health, and particularly that he did not have a tumor. An instruction permitted the jury to understand that if they should find the direct cause of the insured's death was a surgeon's effort to cure the tumor they might ignore the issues raised by the pleadings and find for the plaintiff. *Held*, that the instruction was erroneous.

2. **SAME—Should Relate to the Questions at Issue.**—The court holds that the third instruction for the plaintiff was improper under the issues and evidence in the case; that it wholly ignored the principal contested issue and tended to obscure and mislead.

Assumpsit, on an insurance policy. Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed September 10, 1897.

Instructions referred to in the opinion of the court:

2. If you believe from the evidence in this case that the insured died from any other cause than bowel trouble, cancer or tumor, and that plaintiff has made out, by the evidence, her case, as charged in the declaration, your verdict should be for the plaintiff.

3. If the jury believe from the evidence in this case that the assured took out a policy as stated in the declaration; that he paid the premiums thereon until the time of his death, and that he has in all respects complied with his undertakings in the application and policy, your verdict should be for the plaintiff for the amount of said policy and five per cent interest thereon from the 27th day of June, 1896.

W. C. CALKINS and FOREMAN & WATTS, attorneys for appellant.

WM. P. LAUNTZ, attorney for appellee.

MR. PRESIDING JUSTICE CREIGHTON DELIVERED THE OPINION OF THE COURT.

This was an action in covenant on a life insurance policy or certificate, by appellee against appellant, commenced in the City Court of East St. Louis. The declaration avers

that on the 27th day of January, 1896, upon application of Alonzo H. Cox, appellant made its policy or certificate of insurance upon the life of said Alonzo H. Cox, for the use and benefit of appellee, and by, and with consent of said Alonzo H. Cox, delivered same to appellee. Policy or certificate set out at length in *haec verba*: "that on the 27th day of February, 1896, insured died," etc., in usual form. Appellant pleaded specially with other matter, in substance, the following:

That the application in the said declaration mentioned by express stipulation therein contained, was made the basis of the contract between the said Alonzo H. Cox and this defendant, and the said Alonzo H. Cox warranted the statements and answers in said application to be true, final and complete; admitted the same to be material, and further therein agrees, that if any untrue statements or answers had been made, that the contract should be null and void.

That in said application, the said Alonzo H. Cox did make fraudulent and untrue statements and answers as follows, that is to say, in answer to the question: "Have you now, or have you ever had ulcer or tumor?" the said Alonzo H. Cox answered "No;" when in truth and in fact, the said Alonzo H. Cox had theretofore, and during a period of several months prior thereto, had tumor; that in said application, the said Alonzo H. Cox did make fraudulent and untrue statements and answers as follows, that is to say, "Have you now, or have you ever had disease of the bowels?" the said Alonzo H. Cox answered "No;" whereas, in truth and in fact, he did have and had been afflicted with such disease, as he, the said Alonzo H. Cox, then and there well knew; and avers that by reason of the said disease of the bowels it became necessary, and the said Alonzo H. Cox did submit to a surgical operation, as the result of which he died.

Appellee's replications admit the making of answers to questions propounded in the application, as set out in the pleas, and that such answers are the basis of the contract, and denies that the answers are untrue.

Trial was by jury and resulted in a general verdict for appellee, for \$1,500, the amount named in the policy. Answers were also returned by the jury to questions of fact specially submitted, among others as follows: "At the time Alonzo H. Cox made application for the insurance was he afflicted with tumor? A. No. At the time Alonzo H. Cox made application for the insurance, did he have disease of the bowels? A. No."

Motion for new trial overruled; judgment on the verdict; appellant brings the case to this court by appeal.

The following is all that, in the present state of this case, we deem material of the application signed by the insured, upon which the contract of insurance was based and the policy issued:

"I, Alonzo H. Cox, hereby apply for \$1,500 insurance upon my life in the Covenant Mutual Life Association, upon the whole life plan, and for that purpose make the following statements as the basis of the contract between the association and myself:

Have you had any of the following diseases? Answer each and every question separately, "Yes," or "No."

Disease of the bowels? A. No.

Cancer or tumor? A. No.

Have you ever had any disorder not mentioned above, serious illness, local injury, or disease? A. No.

I, the undersigned applicant hereby agree that all the foregoing statements and answers to questions I adopt as my own, admit to be material, warrant to be true, full and complete, and make the basis of the contract with said association, and in the event any untrue statements or answers have been made this contract shall be null and void, and of no effect."

Signed by ALONZO H. COX.

The weight of the testimony so strongly tends to show that the answers of the insured were untrue and fraudulent that we can only account for the finding of the jury upon the theory that they were misled by the instructions of the court, or moved by prejudice or passion. The second instruction given by the trial court on behalf of appellee is not the law under the issues as made up in the case.

That instruction permitted the jury to understand the law to be that if they should find that the direct cause of insured's death was the surgeon's effort to cure the tumor, an undisputed fact in the case, then all issues raised by the pleadings and contested by the evidence would be of no consequence at all.

The third instruction has no proper place, under the issues and evidence in this case. It wholly ignores the principal contested issue and tends to obscure and mislead. The cause must be reversed and we purposely refrain from detailed comment on the evidence.

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99	584
71	42
100	569

Cleveland, C., C. and St. L. Ry. Co. v. Emile J. Eggmann, Adm'r.

1. **JUDGMENTS**.—*On Special Findings where General Verdict is Defective.*—In a suit against two defendants charging negligence the jury returned a general verdict, and also answers to a number of special interrogatories. The verdict found one of the defendants guilty, but did not mention the other, and the court rendered a judgment of not guilty in favor of the latter. *Held*, that while the verdict should have included both defendants, yet the omission was technical and not material, as the special findings were conclusive, and the judgment was the only one that could have been rendered even had there been a general verdict of guilty.

2. **PRACTICE.**—*As to Questions Calling for Special Findings.*—Questions which do not relate to mere evidentiary facts, but which relate to the ultimate facts upon which the rights of the parties directly depend, may be submitted to the jury for special findings, and probative facts from which the ultimate facts necessarily result stand upon the same basis. Hence, in this case, as an affirmative answer to the refused interrogatory would have been inconsistent with the verdict, it was error not to submit such interrogatory.

3. **VARIANCE.**—*Allegations and Proofs Must Correspond.*—It is a rule in pleading, subject to no exceptions, that a party must recover if at all, on and according to the case he has made for himself in his declaration. He is not permitted to make one case by his allegations and to recover on a different case made by the proof. And this rule applies where the declaration charges that an injury is the result of the concurrent negligence of two defendants, and the jury finds that it was caused by the negligence of but one of them.

C., C. C. & St. L. Ry. Co. v. Eggmann.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO D. WILDERMAN, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed September 10, 1897.

GEO. F. MoNULTY, attorney for appellants.

The plaintiff, having alleged that this accident was caused by the "concurrent negligence" of two defendants, each defendant being charged with a separate act of negligence, and it being averred these two acts together produced the injury, he can not recover unless he proves such separate acts did occur to produce the injury complained of. *Ebsery v. Chicago City Ry.*, 164 Ill. 518; *Howell v. Barrett*, 3 Gilm. 433; *Lambert v. Borden*, 10 Ill. App. 650; *Bloomington v. Goodrich*, 88 Ill. 558.

"It is a rule in pleading, subject to no exceptions, that a party must recover, if at all, on and according to the case he has made for himself in his declaration. He is not permitted to make one case by his allegations, and recover on a different case made by the proof." *Moss v. Johnson*, 22 Ill. 640; *Ill. Cent. R. R. v. McKee*, 43 Ill. 120; *Bell v. Senneff*, 83 Ill. 124; *Ebsery v. Chicago City Railway*, 164 Ill. 518.

This verdict is insufficient. A judgment can not be based upon it. In such cases the proper practice, when the jury brings in a sealed verdict or a verdict in the absence of counsel, is to incorporate in the motion for a new trial the insufficiency of the verdict as a reason why it should be set aside. The following Illinois cases are in point, and show this verdict fatally defective; that no judgment could be entered upon it, and that a new trial should have been awarded: *Wells v. Ipperson*, 48 Ill. App. 581-588; *Broeck v. W. St. L. & P. Ry.*, 13 Ill. App. 556; *Long v. Linn*, 71 Ill. 152; *Hirth v. Lynch*, 96 Ill. 409; *Ottawa Gas Co. v. Thompson*, 39 Ill. 598. See also *Stephen on Plead.* (3d Am. Ed., p. 100).

This suit being for a joint wrong, caused by (according to the declaration) the concurrent act of two defendants, the general verdict should mention both defendants. It was void because it did not. *Schweickhardt v. City of St. Louis et al.*,

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2 Mo. App. 583; Wood v. McGuire's Children, 17 Ga. 361; Settle v. Alison, 8 Ga. 201; Ronge v. Dawson, 9 Wis. 246; Traun v. Wittick, 27 Ala. 570; Hampton v. Watterston, 14 La. Ann. 239; Graham & Waterman on New Trials, Vol. 3, 1378-1384; Gerrish v. Train, 3 Pick. 124.

A. R. TAYLOR, attorney for appellee.

It is not the law of any court or decision that the plaintiff must prove more of his allegations than entitles him to a recovery. Lake Erie & W. R. R. Co. v. Christison, 39 Ill. App. 495.

It is well settled law that a recovery may be had against one of several alleged joint tort feasers without recovering against the others. Slainbrook v. Duncan, 45 Ill. App. 349; City of Roodhouse v. Christian, 55 Ill. App. 109; Severin v. Eddy, 52 Ill. 191; Wabash, St. L. & P. Ry. Co. v. Shacklet, Adm'x, 105 Ill. 381; Cincinnati Ice Machine Co. v. Keifer, 134 Ill. 491, and cases cited.

MR. JUSTICE WORTHINGTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the public administrator of St. Clair county to recover damages from the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the Toledo, St. Louis & Kansas City R. R. Company, charging them with concurrent negligence, thereby causing the death of James Higgins, who was a switchman in the employ of the last named company. The verdict of the jury was, "We, the jury, find the defendant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, guilty, and assess the plaintiff's damages at \$5,000," making no finding as to the other defendant, the Toledo, St. Louis & Kansas City R. R. Co.

The following interrogatories were given at the request of appellant:

1st. Was the pilot of the engine of the Toledo, St. Louis & Kansas City R. R. upon which deceased was riding, too low for the safe and proper operation of the engine?
A. No.

2d. Did the Toledo, St. Louis & Kansas City R. R. Company negligently operate the engine Higgins was riding on by allowing it to be operated with a pilot too low? A. No.

3d. Was the engine of the Toledo, St. Louis & Kansas City R. R., upon which deceased was riding, thrown from the track because its pilot was too low for safe operation? A. No.

4th. Was the "third" or narrow guage rail of this crossing high enough, at the time Higgins was injured, to interfere with the safe operation of an engine equipped with a pilot the usual and proper distance above the rails? A. Yes.

Upon this verdict and special findings, the court rendered judgment for the plaintiff against the appellant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and for the co-defendant, the Toledo, St. Louis & Kansas City R. R.

The portion of the declaration material to be considered is as follows: "And complainant further avers that on the 28th day of October, 1890, whilst said James Higgins, deceased, in the county of St. Clair, aforesaid, was in the due discharge of his duty on an engine of his said employer, riding over the track of the defendants at the point where the track of the defendant Toledo, St. Louis & Kansas City Railroad Company crosses the track of the other defendants in the city of East St. Louis, he was caused to be thrown from said engine, run over by the same, and immediately crushed and killed thereby. And complainant doth further complain and aver the facts to be, that defendants Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Indianapolis and St. Louis Railway Company, had, before the passage of the engine on which said James Higgins was so employed over said crossing, and without any notice to him, said James Higgins, his employer or co-employees, negligently and carelessly raised certain obstructions at said crossing, so that the engine on which said James Higgins was so employed could

not pass over said crossing. That said defendants Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Indianapolis & St. Louis Railway Company, had, before said engine on which said deceased was so engaged, passed over said crossing at said time, negligently and carelessly, by their agents and servants, elevated and raised the rails of an old track at said crossing, so that the engine on which said deceased was so employed could not pass over said crossing safely, and gave no warning or signal of such defective condition of said crossing. That while said James Higgins was on the engine of the Toledo, St. Louis & Kansas City Railroad Company, passing over said crossing, and whilst the said James Higgins and his fellow-servants were exercising due and ordinary care, and without any notice on his part or that of his fellow-servants or employer, of the defective condition of said crossing, caused as aforesaid, the said James Higgins was thrown from said engine and killed, to wit, at the county of St. Clair, at the time and place aforesaid. And the complainant doth further aver that the engine furnished by defendant Toledo, St. Louis & Kansas City Railroad Company to said James Higgins and his associates and fellow-servants, being the same on which said James Higgins was employed at the time he was so thrown therefrom and injured and killed, was defective in that the foot-board was too low, and thereby dangerous.

And the plaintiff avers that the pilot and foot-board of said engine were in a defective and dangerous condition, and insufficient and unsuitable for the use said Toledo, St. Louis & Kansas City Railroad Co. were applying it. That for the purpose to which defendant was applying said engine, it should not have a pilot on, and said pilot and the foot-board thereon as put on said pilot, were too low and defective and dangerous, and liable to strike obstructions on the track and crossing. And plaintiff avers that said pilot was liable to strike obstructions and pull down the foot-board and endanger persons thereon. And plaintiff avers that said defective pilot and foot-board directly concurred with the

negligence of the other defendant in causing the death of James Higgins, as aforesaid.

That by reason of said defective condition of the foot-board and said pilot and engine, as well as by reason of the defective condition of said crossing, caused as aforesaid, the foot-board and said pilot and engine was caused to catch and strike against the said obstruction at said crossing, and thereby said engine was caused to be thrown from said track and said Higgins to be killed, as aforesaid. And complainant doth further aver the defendant Toledo, St. Louis & Kansas City Railroad Co. did not exercise care in furnishing to said deceased said engine in said defective condition, but was negligent in that regard. That defendant, by its agents and servants, having charge of providing said engine to said deceased to work with in the discharge of the duty of his employment, well knew of said defective condition of said engine, before the injury and death of said deceased, and, by the exercise of reasonable and ordinary care, could have repaired said defect and avoided the death of said Higgins. And complainant avers that the said negligence of said Toledo, St. Louis & Kansas City Railroad Co. concurred with the negligence of the other two defendants in causing the death of said James Higgins as aforesaid."

Defendants, the Cleveland, Cincinnati, Chicago & St. Louis Railway Co. and the Toledo, St. Louis & Kansas City Railroad Co. plead the general issue. Plaintiff dismissed as to the Indianapolis & St. Louis Railroad.

The T., St. Louis & Kansas City Railroad was originally a narrow track road, but changed to a standard guage, leaving, however, a short piece of rail, formerly used in its narrow guage track, at and attached to a crossing of the Chicago & Alton; the T., St. Louis & Kansas City Railroad; the C., C. C. & St. Louis. This short piece of rail is referred to as the "third" rail. The declaration alleges that this "third" rail was negligently raised by appellant, and that this raised rail, concurring with too low a foot-board on an engine of the T., St. Louis & Kansas City Railroad, on which deceased was riding, derailed the engine at the cross-

ing, and that this concurring negligence caused the injury complained of.

There is a sharp conflict in the testimony as to whether the derailment was caused in this way, as alleged in this declaration, or was caused by a broken joint, or loosened plate some feet from the crossing, derailing the engine before it reached the crossing.

But as this case must be remanded for reasons outside of the testimony, we express no opinion upon this point.

It is assigned as error, that the court rendered judgment upon the verdict, when there was no finding in it as to the Toledo, St. Louis & Kansas City R. R. Co. In the case at bar this is not material error. The findings of the jury upon the first, second and third interrogations propounded by appellant, were controlling as to the liability of the T., St. L. & K. C. R. R. Co. If the verdict had been against this defendant, these findings being inconsistent with such verdict, if accepted by the court, would have controlled the general verdict, and judgment would have been rendered upon them, in favor of this defendant. "When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly." Section 58c, Chapter 110, Hurd's Statutes, 1895.

In *Egmann v. East. St. L. Connecting Ry. Co.*, 65 Ill. App. 345, the court says:

"Whatever such finding may be termed, it was the concrete determination by the jury of an ultimate and vital fact, which determined in whose favor, if any one, a judgment should be entered. The court applies the law to such fact or facts as found, and enters judgment accordingly if it sustains such finding. No motion was necessary on the part of the defendant to have the judgment so entered."

While the verdict in proper form should have included the T., St. L. & K. C. R. R. Co., yet the special findings upon the above interrogatories being conclusive, the omission was technical and not material. The judgment was the only judgment that could have been rendered if the findings were sustained.

Appellant assigns for error the refusal of the court to submit the following interrogatory to the jury, asked by appellant:

Interrogatory 4. "Did the engine upon which deceased was riding leave the track before it came to the crossing of the Cleveland, Cincinnati, Chicago & St. Louis Railway Co.?"

This interrogatory should have been submitted to the jury. It is alleged in the declaration that appellant raised a rail at the crossing, thereby causing an obstruction which concurring with a pilot placed too low on the engine on which deceased was riding, caused the derailment of the car at the crossing and the death of Higgins.

There was evidence tending to show that the car was derailed before it came to the crossing. If it was so derailed, appellant is not liable as charged in the declaration, which avers "That by reason of said defective condition of the foot-board and said pilot and engine, as well as by reason of the defective condition of said crossing, the foot-board and said pilot and engine was caused to catch or strike against the said obstruction at said crossing, and thereby said engine was caused to be thrown from said track and said James Higgins to be killed as aforesaid."

If the car left the track before it came to the crossing where the "third" rail was, it could not have been thrown from the track in consequence of the raising of said "third" rail.

"The questions which may be submitted to the jury for such special findings, are not questions which relate to mere evidentiary facts, but questions which relate to the ultimate facts upon which the rights of the parties directly depend. A probative fact, from which the ultimate fact necessarily results, would be material."

If the car left the track before it came to the crossing where the "third" rail was, it was not derailed in consequence of the raising of said "third" rail. An answer to said interrogatory in the affirmative would have been inconsistent with the verdict. It was error not to submit the interrogatory.

It is assigned for error, that the declaration averred concurrent negligence, while the verdict and judgment are for a single act of negligence, by one defendant.

There is no averment in the declaration that the alleged obstruction would have caused the catastrophe to an engine properly equipped. The averment is, in substance, that the engine was in a defective condition by reason of too low a foot-board, and that this concurring with the obstruction at the crossing caused the derailment. This was the charge appellant was called upon to answer, and this charge, by its plea, was denied. Appellee might have sued appellant separately, and if the proof warranted, recovered against appellant, whether the negligence of the T., St. L. & K. C. R. concurred, or did not concur. He elected to sue both defendants, charging concurrent negligence. The jury by special findings said that the T., St. L. & K. C. road was not negligent as charged, and that appellant was. In other words, by their verdict and findings, the jury said that there was not the concurrent negligence charged in the declaration, but that the sole cause of the accident was the negligence of appellant. "It is a rule in pleading, subject to no exceptions, that a party must recover, if at all, on and according to the case he has made for himself in his declaration. He is not permitted to make one case by his allegations and recover on a different case made by the proof." *Moss v. Johnson*, 22 Ill. 640; *Ebsery v. Chicago City Railway Co.*, 164 Ill. 518.

"If the pleader, though needlessly, describe the tort and the means adopted in effecting it, with minuteness and particularity, and the proof substantially vary from the statement, there will be a fatal variance." 1st Chitty Pleading, 7 Am. Ed., p. 427; *City of Bloomington v. Goodrich*, 88 Ill. 558.

The court in behalf of appellant, instructed the jury that, "the law is, that the plaintiff must prove his case by evidence as he has laid it in his declaration, that is, he must prove at the trial the facts stated in the declaration, and the material facts proved and the material facts alleged must correspond."

Durbin v. Durbin.

The jury disregarded this instruction. The record fails to show that appellee amended, or applied for leave to amend, his declaration.

We think there is a fatal variance between the allegations and the proof as the jury has found it. Under the view as expressed upon the above points, it is unnecessary to notice other errors assigned.

The case is reversed and remanded.

John W. Durbin v. Lillian B. Durbin.

1. *EQUITY—Power of Court to Enforce its Decrees.*—A court of equity has power to enforce its decrees by lawful methods, and an execution is a lawful method of enforcing the payment of money.

2. *SEPARATE MAINTENANCE—Decree for May be Modified at Any Time.*—A decree for separate maintenance may, at any time, upon due notice, be amended or modified, as justice and equity may require.

Separate Maintenance.—Appeal from the Circuit Court of Fayette County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the August term, 1897. Affirmed. Opinion filed September 11, 1897.

F. M. GUINN, attorney for appellant.

ALBERT & WEBB, attorneys for appellee.

MR. JUSTICE WORTHINGTON DELIVERED THE OPINION OF THE COURT.

At the February term, A. D. 1896, of the Fayette County Circuit Court, a decree for separate maintenance, in favor of appellee, was entered, ordering appellant to pay appellee \$10 a month. In accordance with this decree, payments were made up to and including the month of September, 1896, after which date nothing was paid. On the 30th of March, 1897, appellee filed her petition to modify the decree so as to authorize an execution to issue to collect the unpaid

installments. Due notice was given, and the motion was contested by appellant. Upon the hearing, the court found "that the decree heretofore rendered did not sufficiently provide for its execution, and that it did not provide for the issuing of an execution to enforce the payments of such monthly allowances, and that there is now due petitioner \$60, as provided by said decree." Upon this finding the court decreed as follows: "It is therefore ordered, adjudged and decreed by the court that the decree heretofore rendered in this cause be so modified, and it is hereby so modified, that an execution shall issue immediately against the lands and tenements, goods and chattels of the said John W. Durbin, for the sum of \$60, now found to be due Lillian B. Durbin, together with the costs of this proceeding, which are taxed against John W. Durbin." From this order this appeal is prosecuted.

The decree for separate maintenance, so far as the amount to be paid and the times of payment is concerned, still remains in full force and effect, as originally entered. It is in no wise changed or its operation arrested by the bill for divorce since filed by appellant, and still pending undecided in court.

The modification of the decree complained of consists only in providing an ordinary method for collecting judgments and enforcing decrees, namely, the issuance of an execution against the property of the delinquent debtor. If appellant had obeyed the original order of the court the amendment of the decree would not have been necessary. Standing in default he has no right to complain of a legitimate method taken to enforce an order which he disobeys. A court of chancery has power to enforce its decrees by lawful methods, and an execution is a lawful method of enforcing the payment of money. Besides this, a decree for separate maintenance may, at any time, upon due notice, be amended, or modified, as justice and equity may require.

The decree of the Circuit Court is affirmed.

Justice CREIGHTON, having made the order appealed from, takes no part in the decision of this case.

City of Robinson v. Clara C. Hilderbrand.

1. JURISDICTION—*Of Justices of the Peace and County Courts.*—Justices of the peace in this State have not at any time had jurisdiction in actions to recover damages for personal injuries caused by negligence, and consequently under the statute a County Court has no jurisdiction of such a case.

Trespass on the Case, for personal injuries. Error to the County Court of Crawford County; the HON. JOHN C. EAGLETON, Judge, presiding. Heard in this court at the August term, 1897. Reversed. Opinion filed September 10, 1897.

PARKER & CROWLEY, attorneys for plaintiff in error.

P. G. BRADBURY, attorney for defendant in error.

OPINION PER CURIAM.

This was an action on the case by defendant in error against plaintiff in error, commenced and prosecuted to judgment in the County Court of Crawford County. The declaration charges that plaintiff in error was guilty of negligence in suffering a certain bridge within its corporate limits, and over which it had control, to be and remain in bad and unsafe repair and condition, whereby defendant in error was thrown from a buggy and sustained personal injury.

Plaintiff in error brings the case to this court and assigns, among other errors, that the County Court did not have jurisdiction to try the case.

The statute provides: "The County Court shall have concurrent jurisdiction with the Circuit Court in all that class of cases wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed or the value of the property in controversy shall not exceed one thousand dollars."

Justices of the peace in this State have not at any time had jurisdiction in actions to recover damages for personal injury caused by negligence, and consequently the County Court had no jurisdiction. The judgment below will therefore be reversed.

Baltimore & O. S. W. Ry. Co. v. Mary H. Alsop, Adm'x.

1. **PRACTICE**—*Waiver of Motion for Instruction to Find for Defendant.*—A request by a defendant, made at the close of plaintiff's evidence in chief, for an instruction to find for the defendant is waived if the defendant introduces evidence to meet that of the plaintiff, and after the evidence is closed does not renew the motion, but asks and secures instructions covering the entire case.

2. **RAILROADS**—*Care Required of Night Watchman of Track.*—There is no rule of law holding a night watchman of a railroad track to a greater degree of care for his own personal safety than is usually exercised by careful, prudent persons under the same circumstances.

3. **SAME**—*Running Train at Night Without Headlight.*—A railroad company which runs a train at night without a lighted headlight is guilty of negligence and is responsible to persons who, while in the exercise of ordinary care, are injured in consequence of such failure.

4. **ORDINARY CARE**—*How Shown.*—In an action by the administrator of a person alleged to have been killed by the negligence of the defendant, evidence that the deceased was a temperate, quiet, careful man, is admissible, and in the absence of evidence that the deceased had changed, justifies a jury in believing that he was in the exercise of due care for his own safety at the time of his death.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Effingham County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed September 10, 1897.

PALMER, SHUTT & LESTER, and WOOD BROS., attorneys for appellant.

JAMES W. and EDWARD C. CRAIG, and E. N. RINEHART, attorneys for appellee.

MR. JUSTICE BIGELOW DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee to recover for the death of her intestate, by being run over by a train on appellant's road, on the night of February 11, 1895.

Deceased was a night track-watchman on a section of about seven miles of appellant's road, one-half north and

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the other half south of Beecher City. His duty was to go over the section of road each night and see that it was not obstructed, repair broken rails, and generally to see that the road-bed was in condition for the safe passage of trains. Some of the time he walked, and some of the time he rode on a small three-wheeled hand-car, usually termed a rail-road velocipede, owned and kept by the railway company at Beecher City.

About eleven o'clock at night, of the date before stated, it was cold and as he was returning from the south end of his beat on the velocipede, toward Beecher City, and while passing over a long line of trestle-work which had been filled in with earth to within about two feet of the top, he was run over and killed by a freight train of appellant, going the same way he was, and which was running at a speed of about twenty miles an hour, and was about half an hour ahead of regular time. He was forty-seven years of age, a temperate, careful man, and left a wife and five children dependent upon him for support.

It is alleged in the declaration, as one of the grounds for a recovery, that the headlight of the locomotive was not burning.

Plaintiff below recovered a judgment for \$4,500, from which defendant appealed, and assigns eight errors, the most of which, however, have not been noticed in the brief and argument of appellant's counsel; hence, they need no consideration here.

At the close of plaintiff's evidence, defendant moved the court to instruct the jury to return a verdict for defendant, which was denied by the court, and defendant excepted, and this ruling of the court is assigned as error. Since defendant, after the ruling on the motion, elected not to stand by it, but introduced a large amount of evidence to meet that of plaintiff, and after the entire evidence in the case was closed, did not renew the motion, but asked and secured instructions to the jury, covering the entire case, as viewed by appellant's counsel, it must be presumed that the motion was waived. In passing on this question the

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Supreme Court of this State in the case of J. A. & N. Ry. Co. v. Velie, 140 Ill. 59, say: "Where a defendant, whose motion to exclude plaintiff's evidence, made as soon as plaintiff rests, is overruled, fails to stand by such motion, or to renew it when all the testimony is in, or to request that the jury be instructed to find for the defendant, but introduces testimony of his own to contradict the case made by the plaintiff, and requests that the jury be instructed to pass upon the issues involved and to determine them according to the preponderance of evidence, he therefore waives his right to objection to the action of the court in overruling his motion, and is estopped from assigning such action as error in a court of review." That case has since been followed by *Chicago City Railway Co. v. Van Vleck*, 143 Ill. 480; *Ames & Frost Co. v. Strachurski*, 145 Ill. 192, and *Harris v. Shebek*, 151 Ill. 287, and the rule laid down in these cases may now be said to be firmly established.

It is insisted by counsel for appellant that plaintiff's entire series of instructions are predicated on an erroneous view of the law. The ground of this contention is that the court assumed the deceased was only bound to exercise ordinary care under the circumstances in which he was placed, while it is insisted the law required that he should exercise the highest degree of care for his own personal safety, and so should have gone on foot—not worn an overcoat or protected his ears from freezing by wearing a scarf over his head or around his neck, and especially should not have used a railroad velocipede.

We know of no rule of law holding a night watchman of a railroad track to a greater degree of care for his own personal safety than is usually exercised by careful, prudent persons under similar circumstances. Any such rule as seems to be contended for would be unjust toward a class of persons who, through darkness, storm and frost, often peril their own lives to save the lives and property of others.

Appellant's evidence shows that appellant knew deceased was in the habit of using the velocipede to carry himself

and tools over his beat. It was the property of appellant, and was kept in the section house at Beecher City, and we think from the evidence of appellant's witnesses that the court might fairly assume, if necessary, that the contract of service by appellee's intestate included the furnishing of the velocipede by appellant.

It does not appear from the evidence that the velocipede was in any way instrumental in causing the accident, or that deceased would not have met the fate he did, had he been walking, instead of riding on a car propelled by himself. That a watchman of a railway track, whether walking or riding over it, should exercise greater care and caution for his own safety than when traveling on the public highway, is undoubtedly true. But one watchman of a railroad track, whose duties are the same as hundreds of other persons engaged in the same employment, should not be held to a greater degree of care than the careful, prudent and cautious of these other hundreds, and that is what the jury were told by the instructions, and we are unable to see wherein they are wrong. To say that deceased should not have worn proper clothing, to keep him from freezing while performing his duties, is going beyond the law. The law does not require an humble employe on a railroad to offer himself a vicarious sacrifice to save even the wrecking of a freight train. The fact that deceased did protect himself from the inclemency of the weather, instead of showing that he was careless, shows the reverse.

It is insisted on the part of appellant that it is not negligence for a railroad company to run its trains at night without a headlight burning, and the case of *McDonald v. New York C. & H. R. R. Co.*, 138 N. Y. 663, is cited as supporting this somewhat startling proposition. Turning to the case, we find it was an appeal from an order of the general term of the Supreme Court of New York, which reversed an order denying a motion for a new trial. What the Court of Appeals said in deciding the case is brief, and we cite it entire: "Agree to affirm order, and for judgment absolute for defendant, on stipulation; no opinion.

All concur except Andrews, Ch. J., not voting. Order affirmed and judgment accordingly." Whether the parties correctly stipulated what the law governing the case was, we have no means of knowing.

It is insisted the evidence fails to show that deceased was in the exercise of ordinary care at the time of the accident. It is true there is little direct evidence as to the matter on either side, but plaintiff's witness, Jennings, who had known deceased well for about thirty years, and who was closely associated with him some five years, testified that he was a temperate, quiet, careful man. Such men do not often become reckless and careless, after years of carefulness, and in the absence of evidence showing that deceased had changed, the jury were warranted in believing he was in the exercise of due care for his own safety at the time of his death. It may be further said that, had he been other than a careful, reliable man, he would, in all probability, not have remained long in the service of appellant as night watchman.

It is insisted by appellant that the verdict is unsupported by the evidence. There is no dispute about the fact that the train was running half an hour ahead of time, but there is a conflict in the evidence as to whether the headlight was burning.

The engineer testified that it was lighted at Flora, about 9 o'clock, and he is partially corroborated by a brakeman on the train. On the other hand, Fred Barnes, a traveling man, testifies that he was at Altamont, a station ten or twelve miles southeast of Beecher city, where he had gone on defendant's road; that at the time the train, which killed Alsop, pulled into Altamont, it had a head lamp, but it was not burning. He says he observed it particularly. No witness testifies that the lamp was lighted after the train stopped at Altamont. With evidence of this character before the jury, it can not be said their verdict was against the weight of the evidence. Since it is the province of the jury to weigh it and say which way it preponderates, their finding is binding on this court, and the judgment will therefore be affirmed.

Baltimore & O. S. W. Ry. Co. v. Harrison Faith.
Same v. Sarah Faith.

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1. **HIGHWAYS**—*Existence of, a Mixed Question of Law and Fact.*—The existence of a legal highway in a particular place is a mingled question of law and fact, and when the question arises, the jury should be instructed as to what facts establish the existence of a highway, and it is then for them to say whether such facts have been proved.

2. **RAILROADS**—*What Amounts to Obstruction of Crossing.*—A car negligently allowed to remain upon the railroad track at a public crossing is an obstruction, and an averment that a railroad company carelessly and negligently placed and left one of its freight cars upon and nearly across a public highway, and by means thereof said car was an object highly calculated to frighten teams or horses passing over said highway at said crossing, is substantially an averment of an obstruction of the highway.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Lawrence County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed September 10, 1897.

PALMER, SHUTT & LESTER and GEE & BARNES, attorneys for appellant.

J. E. MCGAHEY, W. A. CULLOP and WM. ROBINSON, attorneys for appellees.

MR. JUSTICE WORTHINGTON DELIVERED THE OPINION OF THE COURT.

These cases grow out of the same occurrence, and are substantially alike. Both cases were tried at the same time, before the same jury, upon the same testimony, and separate verdicts rendered. Harrison Faith's damages were assessed at \$1,000, and Sarah Faith's damages at \$300. They are tried here together, upon the same record, abstract and brief. The declarations are similar in legal effect, and charge, in substance, that said appellant was operating its road, running through the county of Lawrence, and using,

in connection therewith, a certain "Y," or switch track, connecting its road with the C., C., C. & St. L., or Big Four, and that, on the 1st of May, 1895, appellant carelessly and negligently placed and left a freight car upon and partly across a public highway, leading from the city of Lawrenceville across said "Y," or switch track, and by means thereof said freight car so encroaching upon said highway, became and was an object highly calculated to frighten the teams or horses used by persons passing along said highway at said crossing; that said appellant negligently permitted and suffered said car to be and remain so encroaching upon said highway; that upon said day of May, 1895, appellee Harrison Faith, with his wife, in a buggy drawn by a gentle horse, was driving over said highway, from his home to the city of Lawrenceville, and that while so driving and exercising due care and diligence, and while in the act of crossing said "Y," at said public highway crossing, his horse became frightened at said car, so left encroaching on the highway, and in consequence thereof ran away, upset the buggy, and threw appellees forcibly to the ground, whereby they were injured, etc.

Appellant plead the general issue.

The first instruction for appellees fairly stated the material allegations of the declarations, and told the jury that "these allegations plaintiffs are required to establish by a preponderance of the evidence." Due care and diligence on the part of appellees was one of these allegations, and it was not necessary to repeat it in subsequent instructions. The jury by their verdict found that these allegations were proved, and while upon some points the testimony conflicts, an examination of the record fails to show that the verdict is unsupported by the evidence.

Appellant assigns for error that by the tenth instruction for appellees, "the question whether the road was established according to the statute was one of law for the court, and was improperly left to the jury," citing *Harding v. Hale*, 83 Ill. 501. In the case cited the court held it error to leave the jury to determine whether a highway was laid

out, without calling attention to the steps necessary to the laying out of a highway, and say, "the question is a mingled one of law and fact, and not purely of fact, as is assumed by the instruction."

In the present case, the court did call attention, in the seventh instruction, to the different methods of establishing a highway, as follows: "You are instructed that the plaintiffs are at liberty to rely upon establishing the highway in question by proving either a condemnation and the opening thereof, in due form under the statute, twenty years continuous adverse use by the public, or dedication by the owner and acceptance by the public; and if you believe, from the weight of the evidence, that the plaintiffs have proven the establishment of the road in controversy, by either one of these methods, that is sufficient upon the question of the road."

When the jury is instructed as to what facts establish a highway, it is for the jury to say whether such facts have been proved. *Grube v. Nichols*, 36 Ill. 97. While this instruction might have been more explicit in stating what was necessary to prove in order to establish a statutory highway, yet such omission in this case was not material error. The proof was conclusive by several witnesses that the road in question had been used as a public highway for more than twenty years, and that it was ditched, graded and worked by the highway commissioners. This of itself was enough to establish a highway. Counsel for appellant claim that the evidence shows that the cattle-guard on the "Y" has been in the possession of appellant for more than twenty-five years, and has never been crossed or used by the public. This may be true, but if true, it does not prove that the road was not a public highway, or that appellant had the right to store cars thereon. The evidence fails to show that it was ever used before the day in question as yard or switch room for storing cars. It was used in passing cars from the track of appellant to the track of the "Big Four." If its use had been confined to this, the freight car in question would not have been left standing

on the cattle-guard, and on the highway, as alleged in the declaration. Counsel for appellant do not seem to seriously challenge the existence of the alleged highway, but defend upon the ground that the car in question was not upon the traveled track. This appears from their statement on page 10 of their brief, as follows:

"The fault of defendant, if it was guilty of a fault, was in leaving a car within the technical limits of the highway not traveled."

There is a conflict of the testimony as to how close the car stood to the traveled track, some witnesses placing the nearest end from two to four feet, and others from ten to twelve feet. We do not deem this a material point. The question is, was the car upon the highway, as alleged in the declaration, and was this the cause of the accident?

Counsel for appellant criticise "all the instructions which refer the question whether the car of defendant was an obstruction to the highway," etc., upon the ground that this is not the issue made by the pleadings. It is true that the declaration does not use the word "obstruction," or "obstructing the highway;" but it does allege that the car was "negligently left upon and partly across a public highway," etc. This language is sufficient to charge an obstruction. Whether or not it was an obstruction was for the jury to decide. *Young v. Detroit, etc.*, 56 Mich. 430, and cases there cited.

"Public highways belong from side to side and end to end to the public." *Elliott on Roads and Streets*, p. 478.

"No railroad corporation shall obstruct any public highway by stopping any train upon, or by leaving any car or locomotive engine standing on its track, when the same intersects or crosses such public highway, except for the purpose of receiving or discharging passengers, and in no case to exceed ten minutes for each train, car or locomotive." *Starr & Curtis' Stat.*, Chap. 114, Sec. 77.

An object on a highway calculated to frighten a horse may be a nuisance, and is not distinguishable in law from an obstruction which a traveler drives against. *Clinton v. Howard*, 42 Conn. 294.

Western Union Telegraph Co. v. Haltom.

A car negligently allowed to remain upon the track at a crossing is an obstruction. *Pittsburg, C. & St. L. R. Co. v. Kitley*, 118 Ind. 155. This case is on all fours with the one at issue.

“Every unauthorized use of the highway which renders it less safe and convenient for travelers is an obstruction.” *Am. & Eng. Ency.*, Vol. 9, p. 412.

To the same effect are: *Smith v. State*, 23 New J. Law, 712; *Commonwealth v. Blaisdell*, 107 Mass. 284; *Northern C. R. Co. v. Commonwealth*, 90 Pa. St. 300; *State v. Berdetta*, 73 Ind. 185; *People v. Cunningham*, 1 Denio, 524; *The King v. Russell*, 6 East. 427.

The averment, then, that appellant carelessly and negligently placed and left one of its freight cars upon and partly across a public highway * * * and by means thereof said car was an object highly calculated to frighten teams or horses passing over said highway at said crossing, etc., is substantially an averment of an obstruction of the highway, and the instructions referred to do not present an issue not made by the pleadings.

The instructions for appellant were voluminous, and covered every point of its defense.

We find no material error in the record. The judgment in each case is therefore affirmed.

Western Union Telegraph Co. v. G. T. D. Haltom.

1. *DAMAGES—For Mental Anguish.*—Mental anguish and injured feelings, in no way connected with an injury to the person, and resulting from mere negligence, can not be sufficient basis for the recovery of damages.

Trespass on the Case, for failure to deliver a telegram. Appeal from the Circuit Court of Lawrence County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed September 10, 1897.

W. L. Gross, attorney for appellant.

GEE & BARNES, attorneys for appellee.

MR. PRESIDING JUSTICE CREIGHTON DELIVERED THE OPINION OF THE COURT.

This was an action on the case in the Lawrence Circuit Court, brought by appellee against appellant, to recover damages for failure on the part of appellant to deliver to appellee a telegram which a brother of appellee had contracted with appellant to transmit from Cloverdale, Indiana, to appellee, at Lawrenceville, Illinois.

The declaration consists of but one count, and is as follows:

STATE OF ILLINOIS, }
Lawrence County. } ss.

In the Circuit Court, Lawrence County.

To the February term, 1896.

In this case the plaintiff, G. T. D. Haltom, complains of the defendant, which has been summoned, The Western Union Telegraph Company, of a plea of trespass on the case: For that, whereas, the defendant, on the 10th day of May, 1895, was the owner of and possessed of certain lines of telegraph extending from Cloverdale, in the State of Indiana, to Lawrenceville, in the State of Illinois, and upon which lines of telegraph, by means of electricity, it, for a certain reward, was accustomed to transmit and deliver certain messages, usually nominated as telegrams, whenever required. And the plaintiff says that at the said Cloverdale, the defendant then and there had an office, and then and there accepted from one Stockton Haltom, a brother of this plaintiff, a certain message and for a consideration of twenty-five cents then and there paid by the said Stockton Haltom agreed to safely and promptly transmit to this plaintiff a message as follows:

MAY 10, 1895.

To G. T. D. Haltom, Lawrenceville, Ill.

Ike is dead. Come at once to Quincy.

STOCKTON HALTOM.

Which message was delivered and sent to this plaintiff for his express use and benefit, for the reason that the said "Ike"

referred to in the telegram was a brother of this plaintiff, and one for whom this plaintiff had great love and affection, and it was with a knowledge of such facts that the urgent telegram was sent in order that he, the plaintiff, might be present at the funeral of the said brother. And the plaintiff avers that he was at that time residing in Lawrenceville, Ill., at the place where the telegram was directed to be sent, and within the limits of the delivery of the office which the defendant had at that time located in Lawrenceville aforesaid. And that he was well known to all the citizens of said place, and could easily have been found by the defendant's agents, as he was well known to the agent there, as he, the plaintiff, had resided at Lawrenceville for several years.

And the plaintiff avers it was the duty of the defendant to safely and promptly deliver to the plaintiff the said message or telegram, and knew its duty and agreed to do so at the time of the acceptance of the same at Cloverdale, Ind. Yet the plaintiff avers that the defendant, well knowing its duty in the premises, refused to do as it was bounden in law to do, and negligently, willfully and recklessly failed to transmit the said message to this defendant, and by reason of the willful, reckless and negligent acts of the defendant as aforesaid, this plaintiff did not learn of the death of his brother until some days after the burial of the said brother, and was thereby deprived of the privilege of being at the funeral and the burial of the said brother. And this plaintiff says that if the said telegram had been promptly transmitted and delivered, as the defendant was in duty bound to do, he would have been able and would have been present at the funeral and burial of the said brother, as the distance between the two points, Cloverdale in Indiana, and Lawrenceville in Illinois, is not over one hundred miles, and the means of transit between the two places is amply provided so as to have insured his presence as he was in good health and would have been present. And the plaintiff avers that by reason of not receiving the said telegram, and not being apprised of his brother's death, and not being present at his funeral, he, the plaintiff, was brought into reproach and

dislike among his relatives and neighbors who are well acquainted with him, who having reason to believe and did believe that he had knowledge of his brother's death, and was willfully without any sufficient cause absenting himself from paying the last sad tribute of respect to his brother, for whom he had given out that he had great affection, and the plaintiff says that after a time when he became aware that his brother was dead and that he had been unable to be present at his funeral, he was afflicted with great anguish and suffering of mind; that his mental anguish continued for many days; that during said time there was occasioned great injury to his feelings, all caused by the fact that he had been unable to be present at the funeral of his deceased brother, and thereby give the last testimony of his love and affection for him. And the plaintiff avers all this was caused by the act of the plaintiff in not making prompt delivery of the said telegram.

And the plaintiff avers that by the law of the State of Indiana, where the contract was entered into by the said Stockton Haltom for the benefit of this plaintiff and the said telegram accepted from him for transmission, the defendant well knew that for a failure to properly transmit the telegram, it would be liable for all damages occasioned to this plaintiff by mental anguish and injury to his feelings, and then and there accepted the same under the law of Indiana. And the plaintiff says by the law of Indiana an action has accrued to him to demand of the plaintiff all the damages which have been occasioned to him in mental anguish and injured feelings. And he says he is injured in the sum of one thousand dollars, and hence he has brought this suit. And he prays judgment.

G. T. D. HALTOM,

By GEE & BARNES, his attorneys.

To this declaration, a demurrer both general and special was filed by appellant and overruled by the court, after which appellant filed its plea of not guilty. The case was tried by a jury, resulting in a verdict for appellee, assessing his damages at \$230. Motions by appellant in arrest of

judgment and for new trial, both overruled. Judgment on the verdict. Case brought to this court by appeal.

The testimony tends to prove all that is material of the declaration, except the averments that appellant "willfully and recklessly failed to transmit the said message," that by not being present at his brother's funeral he was brought into reproach and dislike among relatives and neighbors, and the averments pleading the law of the State of Indiana. There is no evidence to justify a finding that appellant acted willfully or recklessly; that appellee was brought into reproach and dislike among his relatives and neighbors, and no attempt was made to prove the law of Indiana.

These eliminated, the declaration may stand as showing the material facts of the case.

The controlling question in this case is as to the law for the admeasurement of damages applicable to the facts.

Counsel for appellee contend that because appellant did not elect to stand by its demurrer to the declaration, but chose to plead and contest the facts, it can not now raise that question of law. That position is not well taken. In the declaration is pleaded materially more than the evidence proves.

Out of the facts the law arises. If the law of Indiana, where the contract was made, had been proved to be as pleaded, and the tort counted on been treated as a mere breach of contract, it would have presented a very different question. Counsel state that they did not plead any statute of Indiana, and that the court must presume the common law is referred to. The fact that it is pleaded as the law of Indiana raises the presumption that it refers to such a law of that jurisdiction as the pleader supposed is cognizable here only when pleaded and proved. This case must be determined by the law of Illinois as applicable to the facts established on the trial.

The court gave to the jury on behalf of appellee, and at his instance, the following instruction: "The court instructs the jury, that if you believe from a preponderance of the evidence that the plaintiff has suffered damage, in manner

and form as charged in the declaration, then you should find for the plaintiff, and assess his damages at such an amount as you think him entitled, not exceeding the amount claimed in the declaration."

And the court gave, of its own motion, the following instruction: "The court instructs the jury that the suffering from sickness claimed by plaintiff can not be allowed as an element of damages, unless the weight of the evidence shows that such sickness was the direct result of the disappointment resulting from failure to deliver the message in question."

The only injuries averred in the declaration and covered by the evidence for which appellee claims substantial damages are: That when he became aware that his brother was dead, and that he had been unable to be present at his funeral, he was afflicted with great anguish and suffering of mind; that his mental anguish continued for many days; that during said time there was occasioned great injury to his feelings, all caused by the fact that he had been unable to be present at the funeral of his deceased brother and thereby give the last testimony of his love and affection for him. The court concludes: "And the plaintiff says by the law of Indiana an action has accrued to him to demand of the plaintiff all the damages which have been occasioned to him in mental anguish and injured feelings. And he says he is injured in the sum of one thousand dollars and hence he has brought this suit. And he prays judgment."

The testimony was admitted, over appellant's objection, tending to show that as a result of the disappointment in not receiving the message, appellee became sick and unable to attend to his usual duties, was confined to his bed and under care of a physician for two or three weeks.

We find nothing in the declaration to warrant the admission of this testimony or to justify the instruction recognizing such sickness as an element of the damages in this case.

This brings us to the controlling question. What is the common law rule for the admeasurement of damages, applicable to the facts established in this case?

Vickers v. Tyndall.

Upon this question respective counsel have furnished us all the assistance possible. Both counsel for appellant and for appellee have presented this branch of the case ably and exhaustively.

We have given the subject thorough investigation and much thought and find that the greater weight of authority, and to our minds much the sounder reasoning, calls for a rule excluding mental anguish and injured feelings as independent elements of damages in this class of cases.

We hold the common law to be, that mental anguish and injured feelings in no way connected with an injury to the person, resulting from mere negligence, can not be sufficient basis for the recovery of damages.

Tyrus S. Vickers v. Dora Adell Tyndall.

1. *PRACTICE—Bill of Exceptions Must Show Motion for New Trial.*
—In appeals from judgments based on the verdict of a jury it must appear by a bill of exceptions that a motion for a new trial was made and overruled and exceptions taken, otherwise the case will not be reviewed in the Appellate Court.

Assumpsit, for breach of promise of marriage. Error to the Circuit Court of Massac County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

W. S. MORRIS and W. B. MORRIS, attorneys for appellant.

G. A. CROW and COURTNEY & HELM, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was for a breach of promise of marriage, brought by defendant in error. Trial was had before a jury and a verdict obtained in her favor, on which judgment was entered.

The bill of exceptions does not show that a motion was made for a new trial, or that exceptions were taken to any instructions. Therefore this court can not consider any errors assigned relating to the trial.

As held in *James v. Dexter et al.*, 113 Ill. 656: "It must appear, as has been held by this court in numerous decisions, that the fact that a motion for a new trial was made and overruled and exceptions taken * * * are contained and are preserved in a bill of exceptions, otherwise the case will not be reviewed in the Appellate Court," citing various decisions. It is then further held it is not sufficient that it appear in the record, as made up by the clerk, that such motion was made, overruled and excepted to.

Error is assigned on the refusal of the court to grant plaintiff in error a change of venue on account of the prejudice of the inhabitants of the county where the case was tried. We have examined the record on this question and can not say the court erred in denying such motion.

The judgment is affirmed.

John A. Sterling v. M. M. Fox and Mary Fox.

1. APPELLATE COURT PRACTICE—*Where the Record is Imperfect.*—In this case the court finds no declaration or pleas in the record, nor any mention of them in the abstract, and hence has no means of knowing what issues were tried. Whether the action of the trial court complained of was material error or not, is held to depend largely upon the state of the pleadings, and the judgment is affirmed.

Replevin.—Appeal from the County Court of Madison County; the Hon. WM. P. EARLY, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed September 10, 1897.

TRAVOUS & WARNOCK and J. W. BARTHOLOMEW, attorneys for appellants.

KROME & TERRY and W. P. BRADSHAW, attorneys for appellees.

Kurtz v. Kurtz.

MR. PRESIDING JUSTICE CREIGHTON DELIVERED THE OPINION OF THE COURT.

This appears to have been an action of replevin brought in the County Court of Madison County by appellant against appellees, to recover possession of certain personal property. A trial was had by jury, resulting in a verdict finding the title to the property in question to be in the defendants. Motion by appellant for new trial overruled. Judgment on the verdict. Cause appealed to this court.

Of the numerous errors assigned only three are urged: The giving by the trial court of appellee's first instruction, refusing of appellant's fifth instruction, and the refusal by the court to admit certain testimony offered on the trial by appellant.

We find no declaration or pleas in the record, nor any mention of such in the abstract, and therefore have no means of knowing what issues were tried. Whether the action of the court complained of was material error or not depends much upon the state of the pleadings.

We have, however, examined the evidence with care, and are of opinion that substantial justice has been done, and that upon the merits of the case the judgment of the County Court should be affirmed.

Mary Kurtz v. William H. H. Kurtz.

1. APPELLATE COURT PRACTICE—*Briefs Must be Filed as Required by the Rules.*—The decree in this case is reversed and the cause remanded on account of the failure of defendant in error to file briefs as required by the rules of the court.

Separate Maintenance.—Error to the Circuit Court of Massac County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed September 10, 1897.

C. L. V. MULKEY, attorney for plaintiff in error; THOMAS B. LOVE, of counsel.

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Oskamp, Nolting & Co. v. Jones.

No appearance for appellee.

OPINION PER CURIAM.

Defendant in error having failed to file his brief in compliance with the requirements of the rules of this court, and no sufficient reason or excuse having been offered for such failure, the decree is therefore reversed and the cause remanded.

Oskamp, Nolting & Co. v. A. D. Jones.

1. PRACTICE—*What Errors can Be Considered on Appeal.*—The rule is inflexible that without an exception preserved in the bill of exceptions, no ruling, however improper, that does not relate to the pleadings or appear on the face of the judgment, can be reviewed in an appellate tribunal.

Assumpsit, for goods sold and delivered. Appeal from the Circuit Court of Franklin County; the Hon. OLIVER A. HARKER, Judge, presiding. Heard in this court at the August term, 1897. Affirmed. Opinion filed September 10, 1897.

FLANNIGAN & PAYNE and COBB & HOWARD, attorneys for appellant.

HART & SPILLER, attorneys for appellee.

OPINION PER CURIAM.

Neither the record, nor the bill of exceptions filed here shows any exception to the finding or judgment of the court, or that there was a motion made for a new trial, or that there were any propositions of law submitted to the court.

There is nothing then for this court to review. *Wolf v. Campbell*, 23 Ill. App. 482.

"The rule is inflexible that without an exception preserved in the bill of exceptions, no ruling, however improper,

Bauer Grocer Co. v. Zelle.

that does not relate to the pleadings or appear on the face of the judgment, can be reviewed in an appellate tribunal." Kennedy v. I. C. R. R. Co., 68 Ill. App. 602.

Many cases might be cited to the same effect.

Judgment of court below affirmed.

Bauer Grocer Co. et al. v. F. E. Zelle.

1. **APPEALS AND ERRORS—Involving a Freehold.**—A bill praying that certain deeds be canceled and set aside as a cloud on the title of the complainant, involves a freehold, and this court has no jurisdiction of an appeal from a decree granting the prayer of such a bill.

Bill, to set aside a deed. Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1897. Dismissed. Opinion filed September 10, 1897.

HADLEY & BURTON, attorneys for appellant.

WM. H. TEMME, attorney for appellee.

OPINION PER CURIAM.

The decree in this case is upon a supplemental bill filed by appellee against appellant, to cancel and set aside, as cloud on the title of appellee, certain deeds to real estate held by appellants, which deeds convey said real estate to appellants in fee.

The principal prayer of the bill is: "That said deeds may be ordered canceled and set aside as a cloud on the title of complainant" (appellee). The principal provision in the decree is, that the deeds of appellants be set aside and decreed null and void as a cloud upon the title of appellee to said premises.

This case involves a freehold, and this court has no jurisdiction to hear and determine it. The appeal should have

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been to the Supreme Court. Board of Trustees v. Beale, 6 Ill. App. 536; Fitzgerald v. Fitzgerald, 7 Ill. App. 191; Neimeyer v. Knight et al., 7 Ill. App. 200; Whitehead v. Alexander, 7 Ill. App. 506; Robinson v. Peterson, 7 Ill. App. 398; Hawley v. Simons, 7 Ill. App. 401; Dobbins v. Cruger, et al., 11 Ill. App. 114.

The appeal is dismissed. Leave to appellants to withdraw record and files.

John H. Shroeder v. A. B. Clarke et al.

1. APPELLATE COURT PRACTICE—*Where There is Uncertainty as to What is Before the Court.*—In the trial court two cases between the same parties were tried together and verdicts returned, but no judgments appear to have been rendered, and no stipulation is filed as to which case is appealed. *Held.* that with this uncertainty about the matter the appeal must be dismissed.

Transcripts, from a justice of the peace. Error to the Circuit Court of Randolph County; the Hon. GEORGE W. WALL, Judge, presiding. Heard in this court at the August term, 1897. Dismissed. Opinion filed September 10, 1897.

WM. HARTZELL and J. B. SIMPSON, attorneys for plaintiff in error.

A. G. GORDON, attorney for defendants in error.

OPINION PER CURIAM.

November 16, 1896, plaintiff in error recovered two judgments, for \$124.28 each, against defendants in error, before H. S. Burbes, a justice of the peace of Randolph county, from which defendants appealed to the Circuit Court of said county.

On the trial in the Circuit Court the parties agreed that the two cases should be tried by the same jury. In one of the cases the jury returned a verdict in favor of the defend-

ants, and in the other returned a verdict as follows: "We, the jury, find the defendant entitled to a credit of \$93.50 (ninety-three dollars fifty cents——), leaving bal. due plaintiff \$38 (thirty-eight dollars)."

No judgment appears to have been rendered on either of the verdicts, and no stipulation filed as to which case has been brought here. With this uncertainty about the entire matter, this court can do nothing but dismiss the case.

Lucius R. Finch v. Frank L. Galigher.

71	75
181	625

1. *PLEADING—Effect of Dilatory Motions and Pleas.*—There is no rule of law that the use of more than one dilatory motion or plea in the same case shall have the effect of a full appearance in the case. A defendant may make as many such motions and file as many such pleas as he deems necessary, provided he pursues the regular order of pleading in so doing, and may limit his appearance to the question raised by each successive motion or plea if he so desires.

2. *JUDGMENTS—As a Bar to Suit on Original Claim—The Rule at Common Law.*—It is a well settled rule of the common law that a judgment on a joint obligation, against one or more of several joint obligors, is a bar to any suit thereafter brought against obligors not served, and against whom judgment was not rendered.

3. *SAME—Rendered Outside of State as a Bar to Suit on Original Demand.*—Section 12 of the practice act, providing that a judgment against one of several joint debtors shall not be a bar to a recovery on the original cause of action against those not served, in any suit brought against them in any place other than the county where the first suit is brought, does not apply to judgments rendered outside of the State.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Alexander County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed September 10, 1897.

STATEMENT OF THE CASE.

This suit was begun December 30, 1893, in the Circuit Court of Alexander County, by appellant, against Charles

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Galigher and appellee, to recover upon a promissory note of tenor as follows:

“\$4,486.84.

NEW YORK, July 20, 1886.

Six months after date, we promise to pay to the order of L. R. Finch's Sons, forty four hundred eighty six and 84-100 dollars, at the office of L. R. Finch's Sons. Value received.

CHARLES GALIGHER & SON.”

(Indorsed): “Without recourse.

L. R. FINCH'S SONS.”

The writ commanded the sheriff “to summon Charles Galigher and Frank L. Galigher (late partners under the name and style of Charles Galigher and Son), to appear at the February term of court, 1894.”

On the 30th of December, 1893, the sheriff returned the summons, “Personally served the within writ, by reading the same to the within defendant, Frank L. Galigher. (Charles Galigher not served, by order of plaintiff's attorney.)

Plaintiff's original declaration was filed May 1, 1894. At the May term, 1894, the defendant Frank L. Galigher, limiting his appearance to that purpose only, moved the court to quash the return on the writ, which motion the court overruled. He then, limiting his appearance as before, moved the court to quash the summons, because of a variance between it and the declaration. Thereupon plaintiff entered a cross-motion for leave to amend the writ and declaration, which was allowed and the motion to quash the writ was overruled, and the plaintiff, by leave of court, dismissed his suit as to defendant Charles Galigher, and amended the summons and declaration, leaving Frank L. Galigher the only party defendant named therein. February 11, 1895, the plaintiff, by leave of court, filed an amended declaration, consisting of two special counts on the note, and the common money counts. The first count alleges that, “the said defendant, and one Charles Galigher, late partners under the name and style of Charles Galigher & Son,” executed and delivered the note to L. R. Finch's

Sons; that the latter indorsed it to the plaintiff. That afterwards the plaintiff brought an action against Charles Galigher and the defendant, on the note, in the Supreme Court of the County and State of New York, and that process was served on said Charles Galigher, but not on the defendant.

That on the 22d of November, 1892, plaintiff recovered judgment in said action against the said Charles Galigher for the full amount due on said note. That at the time when said action was commenced, and from thence to the time of the rendition of the judgment the defendant was, and from thence hitherto had been, without, and a non-resident of the State of New York, so that he could not be served with process in said action. That said judgment has not been reversed, annulled, paid or satisfied, in whole or in part.

The second count alleges, that the defendant and one Charles Galigher, late partners under the name and style of Charles Galigher & Son, executed the note, and thereby then and there jointly and severally, "promised to pay," etc., the same as in the first count, except there is no allegation of any action or proceedings on the note, or the recovery of any judgment in the State of New York.

The third count is made up of the common money counts, with a further averment of the recovery of the judgment in the State of New York, substantially the same as in the first count.

The breach is, "Nevertheless, neither the said defendant nor the said Charles Galigher has paid the several sums of money," etc. On February 13, 1895, the defendant, limiting his appearance to that purpose, made a motion to quash the summons as amended, because of a variance between it and the declaration as amended, which the court overruled. On the 23d of February, 1895, the defendant filed his plea in abatement, duly verified, alleging the non-joinder of Charles Galigher as a co-defendant, and further alleging that he was still living, at the said county of Alexander, and praying that because he is not named in the writ that it be

quashed. On the 25th of the same month, the plaintiff moved the court to strike defendant's plea in abatement from the files, because it was not filed in apt time, which the court overruled, and the plaintiff excepted. On the 20th of May, 1895, the plaintiff filed a replication to the defendant's plea, which (after the entitling portion) is as follows: "And the said plaintiff saith that his said writ, by reason of anything by the said defendant in his said plea above alleged, ought not to be quashed, because he says that, on the 22d day of November, 1892, in the Supreme Court in and for the county of New York, in the State of New York, at the November term thereof, 1892, in a certain action brought by the said plaintiff against the said Charles Galigher and the said defendant, upon the said several promises and undertakings in the said plea and declaration mentioned, in which said action the said Charles Galigher, but not the said defendant, was served with process, the said plaintiff recovered judgment against the said Charles Galigher for the full amount then and there due the said plaintiff, as, by the record and proceedings thereof now remaining in the said Supreme Court, will more fully appear. And the said plaintiff avers that when the said action was commenced, and up to the time when said judgment was rendered, the said defendant, Frank L. Galigher, was without the State of New York, and a non-resident thereof, so that process could not be served upon him in said action; and this the said plaintiff is ready to verify by the record. Wherefore he prays judgment if the said writ ought to be quashed, and that the said defendant may answer over, etc.

To this replication the defendant demurred; and on the 27th of May the court took the demurrer under advisement, and on December 12, 1895, sustained the demurrer, quashed the writ, and rendered judgment against plaintiff for costs; to which plaintiff excepted, and appealed to this court, and assigns three errors, viz: First, that the court erred in sustaining the demurrer to the replication to the plea in abatement; second, that the court erred in quashing the summons; third, that the court erred in rendering judgment for the defendant.

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LANSDEN & LEEK, attorneys for appellant.

GREEN & GILBERT, attorneys for appellee.

MR. JUSTICE BIGELOW DELIVERED THE OPINION OF THE COURT.

As the order of the court overruling appellant's motion to strike appellee's plea in abatement from the files has not been assigned for error, this court would be justified in refusing to consider the matter. But since the counsel on both sides seem to have assumed that such an assignment was made, or that the question would necessarily have to be determined under some one of the errors actually assigned, and hence have fully and ably discussed the matter, we have concluded not to ignore it.

If the defendant, before filing his plea in abatement, had appeared for any purpose other than to make motions going directly to the writ, the matter might have been very different from what it now is. What he did, and all he did, before filing his plea, was to move to quash the return to the writ, and this motion being overruled, he next moved to quash the writ for a variance between it and the declaration as they then stood, which was also overruled. In the meantime plaintiff dismissed his suit as to Charles Galigher, and amended the summons so that Frank L. Galigher was the only defendant named therein, and by leave of court filed a new amended declaration against Frank L. Galigher alone; whereupon defendant filed a further motion to quash the amended writ for a variance between it and the amended declaration, which was overruled by the court. In each of these motions the defendant specifically limited his appearance to the object of the motion.

It is a mistake to suppose the defendant was rightfully entitled to make but one dilatory motion, or file but one dilatory plea, without its having the effect of a full appearance in the case. He could make as many such motions and file as many such pleas as he deemed necessary, provided he pursued the regular order of pleading in doing so.

He could not however have made any one of the motions he did make, or filed a plea in abatement for non-joinder, and after that, have rightfully filed a plea in abatement to the jurisdiction of the court, because such a plea comes first in the order of pleading, and the reason is, because there is manifest absurdity in calling upon the court to determine the sufficiency of a motion or plea, and afterward insisting that the court had no jurisdiction to determine anything except its own lack of jurisdiction.

Nor could he have first filed his plea in abatement for non-joinder of Charles Galigher, and then followed it with the motions or any of them he did make, because the plea was founded upon a matter *dehors* the record (and for this reason had to be verified by affidavit), while the motions were not so founded, and hence preceded the plea, in the regular order of pleading, as laid down by all the standard writers on pleading and practice. The motion to strike defendant's plea from the files was properly overruled.

The plaintiff by replying to defendant's plea admitted that Charles Galigher and the defendant were copartners in the execution of the note, and sought to avoid the necessity of making Charles a party to the suit, by setting up the fact that judgment had already been recovered by the plaintiff against him on the note in the county and State of New York.

Whether the defendant could not have raised the question as to the effect of that judgment by demurrer to some of the counts of plaintiff's declaration, we shall not stop to inquire, but the question could certainly not have been raised on demurrer to the second count of the declaration. The effect of this judgment is the vital question in the case.

It is a well settled rule of the common law, a rule long since adopted and steadily adhered to by the Supreme Court of this State, that a judgment on a joint obligation, against one or more of several joint obligors, is a bar to any suit thereafter brought against the obligors not served, and against whom the judgment was not rendered. The reason of this rule is said to be, because the judgment is of a higher

order of security than a simple obligation, and since both can not exist, the entire obligation is merged in the judgment.

To avoid the effect of this rule, a law was enacted by the legislature of this State as long ago at least as 1845, providing that parties not served could, subsequently to the rendition of the judgment, be brought in by *scire facias*, and made parties to the judgment, and this law is now section 10 of our present practice act. In 1872, the legislature enacted another law, which is now section 12 of our practice act, and which is as follows:

“When several joint debtors are sued and any one or more of them shall not be served with process, the pendency of such suit, or the recovery of a judgment against the parties served, shall be no bar to a recovery on the original cause of action against such as are not served, in any suit which may be brought against them in any other place than in the county where the first suit is brought. This section shall not be so construed as to allow more than one satisfaction.”

Appellant has plead no statute of New York saving the merger, and does not contest the fact that this court must presume the common law of England is a part of the law of New York, but as we understand appellant's counsel, the contention is, that section 12 of our practice act (above quoted) saves the note from merging in the judgment, and failing in this, that the fact the defendant was not a resident of, and was not in the State of New York at the time suit was brought and judgment rendered there, prevented the merger. As we regard the first contention the more important, we will first consider it.

The act in which the section is found is entitled “An act in regard to practice in courts of record.” It seems evident to us that the law embraces only joint debtors who are sued and not served in this State, and that the legislature did not intend to embrace joint debtors who might be sued elsewhere, even though they might be residents of this State at the time. The primary object of laws is for the protection

of subjects of the State which enacts them. It will be time to determine the question, if the legislature of this State can legally enact that a joint obligation on which one of the co-obligors has been sued and judgment rendered in a foreign State, shall not become merged in a judgment there when it has attempted to do so. All that it has thus far done is to enact a law which, with the necessarily implied words, reads as follows: When several joint debtors are sued in this State, and any one or more of them shall not be served with process in this State, the pendency of such suit or the recovery of a judgment against the parties served shall be no bar to a recovery on the original cause of action against such as are not served, in any suit, which may be brought against them in any other place in this State than in the county where the first suit is brought." This law is a partial repeal of the common law on the subject of merger, and in construing it courts should be governed by the rule laid down by Mr. Dwarris, which is: "When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of public utility, when the end of the act appears to be larger than the enacting words." Dwarris on Stat., 196.

The case of Shirley v. Shattuck, 54 Mass. (13 Met.) 256, relied on by appellant's counsel, though contrary to the great weight of authority on the question, still falls far short of sustaining the point contended for. In that case, Shattuck and one Bennett were joint obligors and were sued in New Hampshire, and judgment was rendered against Bennett alone. Afterward Shattuck was sued in Massachusetts under a statute which provided, "If such judgment remains unsatisfied, an action on the same contract may be afterward maintained against any of the other joint contractors, as if the contract had been joint and several." This statute is much broader than section 12 of the practice act of this State as will be readily seen. The only analogy of that case to this that we can discover is, there as here the judgment was rendered in a foreign State. The case of Merriman v. Barker, 121 Ind. 74, as well as the other cases

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cited by appellant's counsel, in support of their contention, are cases holding that where the joint obligors are residents of different States, a judgment against one of them, where he resides, is no bar to a suit against others residing in other States. Without going further, it is sufficient to say that the plea of defendant avers that Charles Galigher "is still living at the county of Alexander" in this State, where the suit was brought, and this is not controverted in the replication, and it is not averred in the replication that Charles Galigher and the defendant ever resided in different States. All that is averred might well be true, and yet they may have resided in the same house when the suit was brought and the judgment rendered in New York.

The order of the court sustaining the demurrer and quashing the writ was right, and as, under the circumstances, the court had no alternative but to render judgment against plaintiff for costs, the judgment will be affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1896.

Wabash Railroad Co. v. E. W. Lannum.

1. **CONTRACTS—Signed Under Protest—Effect of.**—Where a party ordered and a railroad company furnished cars for the shipment of stock, under a contract signed by the agent of the company, and the stock was received and shipped by the company under such contract, but another contract was presented to the shipper while he was *en route* with the stock, with a request that he sign it, which he did, in order to secure a right guaranteed by the original contract, but under protest, making it clear that he did not assent to its terms, *it was held*, that the original contract must control and that the second was not binding on the shipper.

2. **COMMON CARRIERS—What Amounts to Agreement for Free Transportation by.**—A letter from the agent of a railroad company containing the following language: "The rate on cattle carload to New York is 81 cents. You can go via Chicago and Buffalo and stop and sell at either place or go on to New York," gives the party to whom it is addressed a right to free transportation upon the train with the cattle.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

STATEMENT OF THE CASE.

Appellee desired to ship four cars of cattle from Bruce, a station on the line of appellant's railroad, to New York, with the privilege of stopping and selling at Chicago and Buffalo.

The company did not keep an agent at Bruce; the business of that station was transacted by its agent at Sullivan, one F. C. Logan, and to him appellee made application for terms and rates for shipment.

He prepared, signed and delivered to appellee a written reply as follows: "The rate on cattle, carload, to New York is 31 cents. You can go via Chicago and Buffalo, and stop and sell at either place or go on to New York. Let me know what kind of cars you would want and what day you want to load as soon as possible.

F. C. LOGAN,

Sullivan, 9-6-'93."

Appellee at once ordered four cars to be brought to Bruce, received them, loaded them with cattle and they were taken into one of appellant's freight trains for transportation under the terms of said writing.

Appellee accompanied the cattle, and when the train reached Sullivan the agent of the company presented to him an instrument called "live stock shipper's contract" for his signature. Appellee testified he objected to some of its terms and conditions, and signed it under protest. It included a paper entitling him to free transportation upon the train with the stock.

He did not desire to stop at Chicago but concluded to put the cattle on the Buffalo market. The connecting carrier (The Delaware, Lackawanna & Western R. R. Co.) to whom the appellant company delivered the cars for transportation beyond its line refused to take the cattle to the Central Stock Yards in East Buffalo, where cattle consigned to be sold in Buffalo are delivered, but unloaded the stock at other yards, which, as it seems, were only used for the reception of stock to be reshipped, and were located nearly five miles from the sales yards.

Appellee remained there nearly twenty-four hours endeavoring to get his stock to the market yards in Buffalo, and failing, had them reloaded on the cars of the said connecting carrier company, to be conveyed to New York City. While *en route* appellee learned the cattle were billed to

Hoboken and that there were no sales yards there, and he procured their destination to be changed to Jersey City.

There he sold at a loss, in comparison with the price he might have obtained had the cattle been delivered for sale at Buffalo, of twenty cents per hundred weight, and the cattle lost in weight by the unloading and reloading at Buffalo and shipment from thence to New York from twenty to forty pounds each.

He contended the appellant company rendered way bills to the connecting carriers containing charges against the stock in the sum of \$21.43 in excess of its proportionate amount of the through total rate, and that he was forced to pay such excess. He brought suit before a justice of the peace and recovered judgment, and the case came into the Circuit Court by appeal, where he again prevailed, and from such last judgment the company perfected this appeal to this court.

Counsel for appellant company urge three grounds for reversal as follows:

First. Appellee was not entitled to recover the difference between the rate given him by appellant's agent at Sullivan and the true rate as fixed by the schedule, because the interstate commerce act prohibited appellant from transporting property at less than the schedule rate.

Second. Appellee was not entitled to recover from appellant for the failure of its connecting line to unload the stock at the Central Yards at East Buffalo: (1), because there was no contract, expressed or implied, to transport said stock to said yards, and (2), because under the contract in evidence it was expressly agreed that appellant should not be responsible for any damage or injury to said stock after it should leave the line operated by appellant, and that all responsibility of appellant should cease after said stock should be delivered to a connecting line to be forwarded to its destination, and (3), because appellee did not show that he made claim for damages against appellant within the time limited in said contract.

Third. Because the court erred in denying appellant's motion for a new trial.

GEO. B. BURNETT, attorney for appellant.

R. M. PEADRO, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The argument in support of the first ground upon which a reversal is asked is that the rate of thirty-one cents per hundred pounds from Bruce to New York, agreed upon by appellee and appellant's agent is less than the rates fixed by the Inter-State Commerce Commission to be charged by all roads for such service, which is thirty-three cents per hundred pounds, and that for that reason the contract was unlawful under the inter-state commerce commission act, which forbids and declares unlawful contracts granting special rates to shippers.

The amount charged upon the way-bill and paid by appellee in addition to the charges of the Delaware, Lackawanna & Western Railroad Company for handling and transporting the cattle from East Buffalo was \$194.60. This, as counsel for appellant company admits (page 19 of his brief), is at the rate of a fraction more than thirty-five cents per hundred for the proportional distance from Bruce to Buffalo, or about two cents per hundred pounds in excess of the rate fixed by the schedule adopted by the Inter-State Commerce Commission, but counsel insist, or rather suggest, for there is no proof upon which to base an insistence, that the excess consists of the costs of loading and reloading the cattle at Buffalo.

We can not adopt the suggestion in the absence of proof, and if we are correct in the view hereinafter expressed as to the right of appellee under the contract, the costs of unloading and reloading the stock at Buffalo should not be cast upon him, and as the amount thereof was added to his freight bill and collected from him it was proper he should be awarded judgment therefor against the appellant company.

The second ground urged for reversal is not tenable. The

writing signed by Logan, appellant's agent, and delivered to appellee may be resorted to to determine the duty and obligation of the appellant company and its connecting carriers, its agents.

This writing, construed in the light of the testimony, proper to be considered in connection with its construction, constituted an undertaking on the part of the company that the cattle should, if the appellee so desired, be transported to Buffalo and there delivered at the stock yards to which the appellant company, or its connecting carrier, usually delivered stock which was intended to be placed upon the market for sale in that city.

Counsel, however, urge the instrument called "Live Stock Shipper's Contract," which the appellee signed at Sullivan, while *en route* with the cattle from Bruce to their destination, is to be resorted to to determine the respective duties and obligations of the parties. We think not.

The appellee ordered, and the appellant company furnished, cars for the cattle under the other contract. The cattle were delivered by appellee for shipment, received by the company and shipped by it under such other contract. While *en route* and while the train in which the cattle were being carried was stopped at the station at Sullivan, an agent of the company presented another written contract and requested appellee, who was accompanying the cattle upon the train, to sign the same. He did so under protest and at the same time questioned whether it correctly and fully set forth the contract.

He had but little time, before the train was again on its way, in which to express himself with relation to it, but we think it appeared from the testimony he said quite enough to make it clear he did not assent to its terms, and that he only signed it for the purpose of securing the necessary papers to enable him to ride free upon the trains of the company and its connecting carriers.

It can not be questioned the writing first signed by the agent at Sullivan, and under which the cattle were delivered and received and shipped, and under which the appellee rode

on the train from Bruce to Sullivan, contemplated and included the free transportation of the appellee upon the train with the cattle.

The actual agreement under which the cattle were shipped was that consummated between the parties before the stock was delivered into cars of the company at Bruce, and as it did not appear the appellee ever assented to another contract or consented to any change in the terms of the actual contract he can not be deemed concluded by the terms of the writing signed by him at Sullivan. *Mer. Des. Trans. Co. v. Furthmann*, 149 Ill. 66.

We therefore hold the appellee was entitled to recover damages from the appellant company for the failure of its connecting carrier to unload the stock at the central yards at East Buffalo.

It would follow from what has been said we do not think the terms of the live stock shipper's contract by which, among other things, it was provided the appellant company liable should not be deemed responsible for any damages or injury occurring after the cattle should be delivered to a connecting carrier, and that claims for any damage or injury should be filed with the company within the time fixed by such contract have any binding force as against the appellee.

Our conclusions expressed as to the first and second grounds are applicable to and fully dispose of all urged in support of the third ground.

The judgment must be and is affirmed.

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79	376

Chicago & Alton R. R. Co. v. Theresa Fell.

1. **VERDICTS**—*Not Sustained by the Evidence.*—This court is unable to agree that it appeared from the proofs that the plaintiff was in the exercise of ordinary care for her own safety at the time she was injured, and feels constrained to reverse the judgment.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

WM. BROWN and J. E. POLLOCK, attorneys for appellant.

FIFER & BARRY, attorneys for appellee.

OPINION PER CURIAM.

Appellee recovered a judgment in the sum of \$7,000, as damages for personal injuries received by being struck by an engine while she was attempting to cross the track of the company's railroad on Washington street in Bloomington.

This is an appeal from the judgment.

While the point is the subject of much conflicting testimony, yet we incline to the opinion we ought to accept the verdict of the jury as decisive of the charge that the engineer and fireman in charge of the engine at the time were guilty of negligence which contributed to the appellee's injury. But we are unable to agree that it appeared from the proofs the plaintiff was in the exercise of ordinary care for her own safety at the time.

When injured she was endeavoring to cross the tracks of the appellant railroad at the crossing of Washington street in Bloomington.

Appellee and her husband came from their home to Bloomington in a buggy with the intention of going to the depot, where she expected to meet her mother who was to arrive on an incoming train.

The horse they were driving became restless and frightened just before they reached the crossing of the railroad and Washington street, and appellee alighted from the buggy in the street and her husband turned the horse about and proceeded to drive him to a quieter portion of the city while she pursued her way to the depot on foot.

She passed from the street to the sidewalk and thence along the walk to the right of way of the railroad company with the design of walking across the track and into the depot.

She walked to the track and attempted to step over the rail nearest her but the engine was there at so near the same

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instant that it struck her foot before it fairly rested upon the ground.

She seemed absorbed in thought of other affairs than such as related to her surroundings, and pursued her way as though oblivious to things about her.

The testimony, even if that of the witnesses for the appellant company be excluded from consideration, so strongly antagonizes the position that she was in the exercise of ordinary care that we are constrained to reverse the judgment.

In view of the fact that the case must be again heard we refrain from commenting in detail upon the testimony.

In order that the truth upon the question of appellee's conduct on the occasion in question may be more fully disclosed, and also the truth upon all other issues of fact involved may be again submitted to the consideration and judgment of another jury, we will remand the case.

Judgment reversed and cause remanded.

71	91
487	428

William H. Slack et al. v. William E. Hughes.

1. *EQUITY—The Rule that a Court of Equity Should do Complete Justice Applied.*—On a contest over funds in the hands of a master in chancery it appeared that two assignments of the amount due had been made; that both were given to secure debts owing by the original owner of the fund, and that the amount due the holder of the prior assignment was in dispute. The trial court ordered the money paid to the holder of the prior assignment. *Held*, that this was error, and that the rule that a court of equity having jurisdiction should do complete justice to all the parties interested and properly before it, required an order that the rights of the parties be ascertained from testimony before the court or master, and decree made accordingly, which should end the litigation.

Order of Distribution, in partition suit. Appeal from the Circuit Court of Greene County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded, with directions. Opinion filed June 16, 1897.

JOHN C. WILSON, attorney for appellants.

JAMES R. WARD and ALBERT SALZENSTEIN, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The parties here respectively and adversely claim certain moneys in the hands of the master in chancery of Greene county, which are the distributive shares of Minnie E. and Jennie L. Bowman in the proceeds of the sale of certain lands in that county, under decree in proceedings for the partition thereof. John C. Wilson was the solicitor for those ladies, and, having obtained a judgment against them for alleged services as such, in the Superior Court of Cook County, on a note and warrant of attorney amounting to \$848, he filed in the partition case, before any order for distribution was made, his intervening petition, in the nature of a creditor's bill, to reach their shares in satisfaction of his judgment; on which petition, though resisted, the court, on October 22, 1894, made an order directing the master to pay him out of their shares the sum of \$594 and his costs; and that order was by this court affirmed, for reasons stated in the opinion. See *Bowman v. Wilson*, 64 Ill. App. 73.

In obtaining the judgment in the Superior Court of Cook County, in resisting the motion there made to vacate it (which was denied on his entering a credit thereon), and in the contest upon his intervening petition in the Circuit Court of Greene County, and on appeal in this court William E. Hughes, the appellee here, was his attorney; and to secure the payment for his services and disbursements in these and some other matters, he obtained from Wilson, on the 20th of October, 1894 (two days before the order of the court directing the master to pay Wilson, as stated), an order to the master to pay him, Hughes (which was accepted by the master subject to the action of the court), on the following day, and on the 24th a formal assignment to him of the judgment against the Bowman sisters.

On the 24th of February, 1896, which was the opening

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day of the term of the Circuit Court, in Greene county, next following the affirmance by this court of its order to the master to pay Wilson, the appellants here filed their motion in that court in the partition case for an order to the master to pay them the amount of the Wilson judgment, on the alleged ground of an assignment by him to them of that judgment; and on the next day the appellee, Hughes, filed his motion for an order to the master to pay him, on the alleged ground of a prior assignment of said judgment by Wilson to him. On the afternoon of that day these adverse motions were heard together, upon the evidence produced by the parties, respectively—Wilson himself appearing as the attorney and witness for appellants—and on the next day the court denied the motion of appellants, sustained that of appellee, and made its order directing the master to pay him. From those orders this appeal is prosecuted.

Hughes also was examined as a witness. Wilson testified that he had never made an assignment of the judgment to Hughes; and that he had assigned it to appellants on the 29th of June, 1895. But it appears that he had then been informed that the alleged assignment to Hughes had been mislaid by him and could not then be found; and further that the assignment to appellants was accompanied by a declaration of trust by them, reserving to himself the excess, which was considerable over the amount then due to them. The original assignment and declaration were not produced, and no satisfactory account for the failure to produce them was given but he offered, what he testified were copies of them. He was confronted with the original and earlier assignment to Hughes, which in the meantime had been found, and testified that he had forgotten the fact of his making it. From the relations of the parties as shown, we think it most probable that appellants had notice of it when and before they received theirs. From these relations, the unsatisfactory showing as to the consideration of the alleged indebtedness to appellants and the admitted reservation from the assignment to them of an interest to

the assignor, we are satisfied that the court rightly held it invalid as against Hughes.

But it appears from the testimony of Hughes himself that the assignment to him was intended and understood to be only as security for the amount actually due to him, and whether that was equal to the amount ordered to be paid by the master to him, he declined to say, though directly asked by the court. He said he could not state, because it was unsettled. Whatever, therefore, may have been his strict legal right from the terms of the assignment, to the full amount of the judgment as reduced by the credit, he was equitably entitled to no more than should be found, upon a settlement, to be actually due to him. His motion was addressed to a court of equity which had control of the fund and jurisdiction of the parties adversely claiming it. Very hostile feeling is shown to have existed between Hughes, on one part, and Wilson and the appellants on the other. The entire fund should not have been put in possession of Hughes, who was in equity a trustee as to the excess, if any there should turn out to be, and the *cestui que trust* left to an independent proceeding, at law or in equity, to obtain his or their right to such excess. The familiar rule that a court of equity, having jurisdiction, should do complete justice to all the parties interested and properly before it, required an order that these rights should be ascertained from testimony before the court or the master, and decree made accordingly, which should end the litigation. We are therefore of opinion that the order made was improper, and should have been that the matter be referred to the master to take and report proof as to the amount actually due to Hughes, and upon its ascertainment be decreed to be paid to him, and the excess, if any, to appellants, to the amount of their claim as shown, and the residue, if any, to Wilson.

The order made will be reversed and the cause remanded with directions to that effect.

The costs of this appeal will be divided equally between the parties, except the costs of additional abstract, which should be charged to appellants.

Israel D. Scott et al. v. Trustees of Schools et al.

1. **CONSTRUCTION—Of Formal Statutory Documents—When the Court will Supply Omitted Words.**—Formal statutory documents, prepared without a form for guidance by persons unskilled in technical composition, are seldom found to be models of neatness and accuracy, and in construing such documents, if a legitimate object and sense can be reasonably ascertained from what is expressed, the court will supply its appropriate expression.

2. **SCHOOLS—Petition for the Formation of a New District Held Sufficient.**—A petition was presented to certain trustees of schools as follows: "To the board of trustees of schools of * * *: We, the undersigned petitioners and legal voters residing within sections * * * and the territory contained in said four (4) sections be made in a new district No. five (5), T. 16 N., R. 11 W., and that the territory contains more than ten families and is taken part from District No. one (1) and District No. two (2) in said township and range and that there will still remain more than ten families in each of said districts Nos. one (1) and two (2)." *Held*, that the clause "and the territory contained" should be construed as if it were "ask that the territory contained," and that when so read the petition substantially complied with the requirements of the law as to petitions for the formation of new school districts.

3. **SAME—Notice of Petition for the Formation of a New District Sustained.**—A notice of the filing of a petition for the formation of a new school district addressed to the directors of district No. one, was delivered to the president of the board of district No. two and by him filed with the clerk of the board of school trustees of the township, a considerable number, claiming to be a majority of the voters residing in district No. two, filed notice with said clerk of their opposition to the petition, a copy of which was attached to said notice, and appeared before the trustees and opposed the petition, but made no objection to the notice or the service of it. *Held*, that under the circumstances the notice was sufficient.

Petition, for writ of certiorari. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

J. W. SHEPHERD and H. VAN SELLAR, attorneys for appellants.

A. Y. TROGDON, F. W. DUNDAS and JAMES A. EADS, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Certain residents of the territory comprising sections 13, 14, 23 and 24 in T. 16 N., R. 11, west of the 2d P. M., in Edgar county, sought to have it made a new district as No. 5, by taking said sections 13 and 14 from district No. 1, and the others from district No. 2, under section 47 of the School Act of May 21, 1849 (R. S., Hurd's Ed. of 1895, Ch. 122, Sec. 76). An order to that effect was made by the trustees, from which an appeal was taken to the county superintendent, who dismissed it, with a direction to their clerk to proceed as if it had not been taken. On a petition for a certiorari presented to a judge in vacation, an order for the issuance of the writ was indorsed by him, and it was issued to the board of trustees, their clerk and the county superintendent, to certify a complete record of their proceedings in the premises for review by the Circuit Court at its September term, 1895. By the judgment on the hearing, the writ was quashed, from which judgment this appeal was taken.

Only three points are urged for a reversal. First, that the paper presented to the trustees as a petition for the new district was not in conformity with the statute, and was wholly insufficient to warrant the order made thereon (Sec. 77, Hurd); second, the notice of the making and filing thereof was not delivered to the president or clerk of the board of directors of district No. 2, as required by section 79; and third, that the county superintendent did not "investigate the case upon the appeal" taken to him, as was made his duty by section 84.

The paper claimed as the petition to the trustees was as follows: "To the board of trustees of schools of township sixteen north, range eleven, west of 2d principal meridian in Edgar county and State of Illinois:

We, the undersigned petitioners and legal voters resident within sections thirteen, fourteen, twenty-three and twenty-four, in township sixteen north, range eleven, west of the 2d P. M. in said Edgar county and State of Illinois, and

the territory contained in said four sections be made in a new district No. 5, T. 16 N., R. 11 W., and that territory contains more than ten families, and is taken part from district No. 1 and district No. 2 in said township and range, and that there will still remain more than ten families in each of said districts one (1) and two (2)."

To this was appended a list of names of persons, and a certificate of three, subscribed before a justice of the peace, that "two-thirds of the legal voters in above named district have signed this petition according to law."

The statute authorizes the trustees so to change school districts of their townships, when "petitioned" so to do by two-thirds of the legal voters residing in the proposed new district (section 76), and declares that no such change shall be made unless so "petitioned for" (section 77), *Parr v. Miller*, 146 Ill. 598, and reaffirmed in *People ex rel. v. Allen*, 155 Ill. 402. A "petition" is thus made requisite, though no particular form is prescribed.

But it is said the paper in question is not a petition, in form or substance; that it in no way appears on its face to ask, request or pray for the formation of a new district, or for anything else, and is a nullity.

Formal statutory documents, prepared without a form for guidance, by persons unskilled in technical composition, are seldom found to be models of neatness and accuracy. This one is so defective that without supplying some omitted expression of what must reasonably be presumed was intended, it would appear to be without any object or sense. If a legitimate object and sense can be reasonably ascertained from what is expressed, the court will supply its appropriate expression.

It is certainly a reasonable presumption that the "unsigned" had in view some object, the accomplishment of which was to be sought and furthered by it. They represent themselves as "petitioners," that is, persons who ask, request or pray for something. That must have been either that some change of an existing condition "be made" or that some apprehended change therein "be not made." What

one hath he doth not hope for, much less pray for. Every condition mentioned in this paper was an existing condition and therefore not to be prayed for, except one; and that one was a school district embracing the four sections mentioned, of which two were part of one and two of another district then existing. That they might "be made in a new district" was a change in the existing condition which was the only natural subject of petition mentioned. By reference to the statute, it is found that the undersigned constituted the requisite proportion of all those who alone were authorized to present such a petition, and that the paper was addressed to those who were alone empowered to grant it. And finally, the record shows it was supported by the undersigned, opposed by others, residing respectively in districts one (1) and two (2), pursuant to notices of opposition filed by each (being the only opponents who appeared), and understood and acted on by the trustees as a petition for the formation of a new district out of the four sections mentioned. From these facts and considerations, we hold it beyond doubt, a petition substantially complying with the requirement of the law. The clause "and the territory contained in said four sections be made," etc., should be construed as if it were "ask that the territory contained," etc. *Young v. Harkleroad*, 166 Ill. 318.

It appears that notice of the making and filing of said petition, together with a copy of it, according to the form given in the statute (Sec. 79), was made out in duplicate (there being two districts to be notified), one of which was delivered to the proper officer of each of said districts, and by him filed with the clerk of the board of trustees.

The form so given, is: "The directors in district No. —, in township No. —, range No. — of the — principal meridian, will take notice," etc. In those so delivered, these blanks were filled alike, and properly as to all except the first, in both of which that was filled by inserting "one (1)." For that error in the one delivered for district No. two (2), it is claimed that the notice required by the statute was not given to the directors of that district, and therefore the trustees could not act upon the petition.

I. C. R. R. Co. v. Davis.

The record shows that the notice in question was intended for the directors of that district, and was actually delivered in apt time by one of the petitioners to the wife of Sol. King, then the acting president of the board, for him, at his home, and by her to him on the same day; that he filed it with the clerk of the board of trustees; that a considerable number, claimed to be "a majority of the voters residing in each of the districts, filed notice with said clerk of their opposition to the petition, a copy of which was appended to the notice so served on King, and that they appeared before the trustees and made their opposition. It does not appear that any exception to the notice or to the service of it was then taken or suggested. We think it was sufficient.

All the papers in the case were delivered to the county superintendent, April 18, 1895, on the appeal taken to him from the order of the trustees, and by him returned to the clerk of that board with his order and direction in the case on May 28th. The matter was in his hands for more than a month. There is no evidence that he failed to investigate the case. His order dismissing the appeal and directing the clerk to proceed as though no appeal had been taken, was substantially an affirmance of the action and order of the trustees.

Finding no material error in the record, the judgment of the court below will be affirmed.

Illinois Central R. R. Co. v. Thomas Davis.

1. **EMINENT DOMAIN—*Damages to Property Not Taken.***—The right to recover damages for injuries to private property occasioned by the occupation of other property for public use is secured by the Constitution of 1870. And in a suit against a railroad company, for damages caused by the construction of additional side tracks, it is immaterial whether the fee of the street is in the public or the railroad.

2. **LIMITATIONS—*As to Damages Caused by the Construction of Railroad Tracks.***—The fact that the statute of limitations has run as to damages caused by the original construction of a railroad in a public

street, does not prevent a recovery for damages caused by the construction of additional tracks.

Trespass on the Case, for damages to real estate. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

PALMER, SHUTT, DRENNAN & LESTER, attorneys for appellant.

STEVENS & LANPHIER, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

In the court below appellee recovered judgment on a verdict for \$250 against appellant, for damage alleged to have been caused to his residence by the location of its tracks and the operation of its trains. The pleas were, not guilty, and the statute of limitation of five years. Motions to instruct for the defendant at the close of the evidence and for a new trial were denied, and exception thereto duly taken, and from the judgment rendered this appeal is prosecuted.

Madison street in Springfield, running east and west, crosses Fifteenth, running north and south, and appellee's lot is on the southwest corner of their intersection—known as lot thirty-two in the Cottage Garden Addition to the city. About the year 1867, in anticipation of the extension of Madison street he purchased it of N. H. Ridgely, as a corner lot, built a dwelling house thereon, afterward enlarged, and has ever since occupied it with his family as their residence. That street was afterward extended as expected, and by an ordinance of March 11, 1871, the city granted to the Springfield & Southeastern R. R. Co., the Gilman, Clinton & Springfield R. R. Co., and the Springfield & Northwestern R. R. Co., the right of way upon Madison street, from the east line of Thirteenth west and that part east of Fifteenth to Grand avenue, upon a single track in

the center of said street, together with such side tracks as should be necessary for the successful operation of said roads, upon condition, among others, that these railroad companies should procure the right of way between Thirteenth and Fifteenth streets, of the same width as that of Madison, west of said streets, and dedicate to the city for street purposes so much of the street as should not be needed for those of said road or roads, for a single track. In May, 1871, Ridgely conveyed to John Williams the land required for the opening or extension of Madison street past appellee's lot. Williams and wife, by their deed of September 1, 1871, "Grant, bargain sell, convey and confirm and dedicate to the city of Springfield, for a street and public highway," the lots described—reserving to the railroad companies the rights conferred by the ordinance—"to have and to hold for the use and purposes aforesaid," with covenants of seizin, against incumbrances, and of warranty against the claims of themselves, their heirs and assigns. In November of the same year they quit-claimed the same lots to the Clinton, Gilman & Springfield Railroad Company, and to its rights, whatever they may be, appellant has succeeded; under which it claims the fee in the street, while for appellee it is claimed to be in the city.

During the year 1871, after the passage of the ordinance, the C. G. & S. R. R. Co. laid its main track in the center of Madison street along the north side of appellee's lot, and four switches between it and said lot—the switches commencing in the main track opposite the lot and extending east across Fifteenth street, the southernmost switch being at the nearest point about sixteen feet from the northwest corner of said lot.

Of this arrangement and location of these switches appellee made no complaint. In his business he used to drive a lumber wagon, with which he could pass between the switch and his fence. But in the summer of 1895 appellant procured the passage of an ordinance authorizing it to change and extend the lines of these switch tracks; and under it a relocation of them was so made as to extend

them west, nearly to Fourteenth street, to bring the south rail of the south one within five feet, and of course the ends of the ties still less, from appellee's lot, at the corner of Fifteenth and Madison streets. No vehicle could pass between the track and his fence to or from Fourteenth. His dwelling fronted on Madison. There were two switch posts on that street between the south track and his lot. These tracks were more widely separated and extended for the purpose of accommodating more cars and relieving the main track. This was doubtless important to the company, but the evidence tends to show it materially impaired appellee's rightful use and enjoyment of the streets and damaged his property; that more engines and cars were left standing in front of his residence, nearer to it and for longer periods; that the vibration of the foundation and walls of the house was greatly increased; that smoke and noxious vapors from the engine filled it; that cinders were thrown like hail upon the porch and against the windows, so that it was impossible to keep the house clean. And beside the evidence in the record, it appears that the jury, pursuant to a stipulation of the parties, were allowed to view the premises.

The damages found were clearly within the range of the proof, and the only question is whether appellant was liable for them. That question, we think, is so well settled against it, that but little need be said beyond the citation of a few Illinois cases.

The evidence was confined to the damage caused by the relocation of the switch lines in 1895, to which the statute of limitations did not apply. And whether appellant or the city owned the fee in the street is immaterial. For all the damages here claimed and shown, appellee had the warrant of the constitution of 1870. Whether appellant relocated its switch tracks of its own motion, as owners of the fee, or by authority of the ordinance, it was subject to its liability for damages of this kind, if any were thereby caused, for the reason that the constitution, controlling both, made it so. *Lake Erie & W. R. R. Co. v. Scott*, 132

Ill. 429; Rigney v. The City of Chicago, 102 Ill. 64 and cases there cited; C. & W. I. R. R. Co. v. Ayres, 106 Id. 511. No other property was affected in like manner. Judgment affirmed.

J. J. Hardin and D. O'D. Hallihan v. County of Sangamon.

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1. **COUNTIES—Functions of the County Board Largely Executive.**—Under our statutes the functions of a county board are largely executive as they buy, care for, lease, sell and convey real and personal property, make contracts, examine and settle accounts, appoint agents, erect buildings and keep them in repair, provide rooms, furniture and other facilities for the transaction of the business of the county officers, and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.

2. **SAME—Right of Possession of County Property Vested in County Board.**—A county has such right of possession and control of a court house as attaches to and flows from its ownership, and its corporate powers and duties imposed by law, and in respect to such powers and duties the county board is the county, and has a continuing right of possession of a court house belonging to the county, and may bring a forcible entry and detainer suit in the name of the county to recover possession of any part thereof illegally occupied.

3. **SHERIFFS—Character of their Possession of Court Houses.**—A sheriff has no such possession of a court house as gives him the sole right to maintain an action in his own name for a trespass to, or forcible entry and detainer of it, or any part of it.

4. **SAME—Are Mere Custodians of Court Houses.**—The statute gives a sheriff the custody and control of the court house and jail of his county, "except as otherwise provided," but he is a mere custodian and does not supersede the owners in their actual or legal possession, and in whatever he does touching the care of them, he is subject to and acts under the express or implied authority of the county board, except as to orders of the court he is attending where its convenience, dignity or duty is immediately concerned or where such orders are expressly authorized by law.

5. **SAME—Possession of Court House by, is Possession of County.**—The law does not recognize any estate or interest of the sheriff, possessory or otherwise, in the court house or jail. They are purely public buildings, belonging wholly to the county as a body corporate, dedicated to public uses only, in which therefore, while so used, no other person,

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natural or artificial, private or official, can have any exclusive proprietary right. The sheriff's relation to them is only that of one employed and paid to take care of them for these uses, as a part of his official duty, and all the possession he has, being merely incidental to that part of his duty, is in fact and law, the possession of the county.

6. **RECORDERS—*Character of Their Possession of Their Offices.***—A county recorder is a public officer, chosen as the agent of the law for certain public purposes prescribed and limited by it, and the county in its corporate capacity provides him with an office, and lets him into possession of it for those purposes, and those only. His right extends no further than is necessary or naturally incidental to the performance of his official duties and his possession is the actual possession of the county.

7. **SAME—*Right of Public to Use Offices of, Defined.***—The statute provides that all persons shall have free access for inspection and examination to the records, indices, books and instruments kept in the office of any recorder, and the right to take memoranda and abstracts thereof without fee or reward, but this is the extent of the right of the public to use or occupy a recorder's office without the consent of the county, express or implied, and no one is by law authorized to occupy it or any part of it as his office for the regular and continuous transaction of his private business.

8. **FORCIBLE DETAINER—*Actual Possession.***—Persons who keep their private books, blanks, furniture and other means required for the transaction of their private business as abstracters and conveyancers, in the office of a county recorder and transact their business there, are in actual possession of at least so much of such office as is thus used, within the meaning of the forcible entry and detainer act.

9. **SAME—*When Judgment May Be for the Whole of Premises Claimed.***—Whether the judgment and execution in a forcible entry and detainer suit should be for the whole or only a part of the premises claimed, if either, depends, not on the extent of the defendant's actual possession, but on the extent of the plaintiff's right of possession, and the fact that the defendant was in possession of only a part of the premises claimed can not be urged as an objection to a judgment for the whole of the premises.

Forcible Detainer, for part of a recorder's office. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

PATTON, HAMILTON & PATTON, attorneys for appellants.

The action of forcible detainer being a special statutory proceeding, summary in its nature and in derogation of the common law, it follows that the statute conferring jurisdiction must be strictly pursued, and each case must be shown

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to be within the meaning and intention of the statute in order that the court will take jurisdiction of it. *French v. Willer*, 126 Ill. 611; *Burns v. Nash*, 23 App. 552.

The plaintiff must always show a right of possession in himself and can not rely on the lack of the right of possession in the defendant. *McIlwain v. Karstens*, 152 Ill. 135.

In a suit for forcible detainer, as this is, the plaintiff must show that he was entitled to possession at the time the suit was brought. *Maloney v. Shattuck*, 15 Ill. App. 44.

It is also well settled in this State that neither forcible entry nor forcible detainer will lie by the owner of the land who has leased same to a tenant, because the right to the possession is, in such case, in the tenant. *Mann v. Brady*, 67 Ill. 95; *McCartney v. McMullen*, 38 Ill. 237; *Dudley v. Lee*, 39 Ill. 339.

And this is true even when the tenant has not taken possession under the lease.

The law is that plaintiff can not maintain forcible detainer unless the defendant's possession is shown. *Bowman v. Mehring*, 34 Ill. App. 389; *Godard v. Lieberman*, 18 Ill. App. 366.

Possession is usually defined to be "The detention or enjoyment of a thing, which a man holds or exercises by himself or by another who keeps or exercises it in his name. It implies exclusive enjoyment." 18 A. & E. Ency. 840.

To constitute possession of land there must be some unequivocal act of ownership upon it. *Brooks v. Bruyn*, 24 Ill. 373.

E. S. SMITH, attorney for appellee.

A person who does not eat or sleep on premises, but who occupies them with his effects is in possession and can not be expelled by force. *Baker v. Hays*, 28 Ill. 387.

An entry against the will of another is forcible in contemplation of law. *Croff v. Ballinger*, 18 Ill. 200; *Smith v. Hoag*, 45 Ill. 250; *Reeder v. Purdy*, 41 Ill. 279; *Phelps v. Randolph*, 147 Ill. 335.

The action of forcible detainer may be maintained against any one wrongfully in possession.

The landlord may maintain the action against the sublessee. *Reed v. Hawley*, 45 Ill. 40; *Patchell v. Johnston*, 64 Ill. 305.

Or the tenant against the landlord. *Phelps v. Randolph*, 147 Ill. 335.

The action will lie against one wrongfully holding a room. *Reynolds v. Thomas*, 17 Ill. 207; *Patchell v. Johnston*, 64 Ill. 305.

One joint tenant may maintain the action against his joint tenant for a moiety. *Mason v. Finch*, 1 Scam. 495.

A license to occupy may be revoked at any time and gives the licensee no right of occupancy against the licensor. *Dunstedter v. Dunstedter*, 77 Ill. 580.

A person acquiring the right of possession, though not in possession, may maintain the action. *Ball v. Chadwick*, 46 Ill. 28.

Even the owner may not forcibly enter. His remedy is in forcible detainer. *Reeder v. Purdy*, 41 Ill. 279.

The landlord may maintain the action where the tenant attorns to another person. *Fortier v. Ballance*, 5 Gilm. 41; *Fusselman v. Worthington*, 14 Ill. 135.

The forcible detainer act should receive a liberal construction. *Jackson v. Warren*, 32 Ill. 339; *Wilburn v. Haines*, 53 Ill. 207.

The ownership of public property by the county carries with it the right to its possession. *Dahnke v. People*, 57 Ill. App. 619.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This case is *novus hospes* in court, and therefore likely to go farther. The material facts are as follows:

Appellants, for ten years or more, have carried on, in Springfield, the business of making and selling abstracts of title, and kept continuously in the office of the recorder of deeds of Sangamon county a desk, chairs, bookcase and abstract books of their own, used in their said business. Hallihan regularly spent most of his time there when said

office was open, making and selling abstracts for profit. He there received orders for work, met his clients, and, being a notary public, prepared conveyances and took and certified acknowledgments. He had no key to that office, nor any special arrangements with the recorder for such occupation of it; but the board of supervisors, at their September session, 1891, to settle a controversy which had arisen with a rival firm, adopted a resolution that "each of said firms be allowed room for one desk and one bookcase, as now located and used by them; also two representatives each in said office, and that neither of said firms be allowed to use a typewriter in said office." To the adoption of this resolution, which was previously shown to him, Hallihan expressly consented, and continued to occupy accordingly, though the rival firm withdrew. At their June session in 1895, the board of supervisors revoked this license, first, by a resolution of the 12th, ordering generally that no part of the county court house or grounds should be "allowed to be used by any one for the transaction of any private business whatever," and that the custodian of this property should "see that this order is strictly observed and enforced from this date;" and more especially by another of the 14th, reciting the preceding order and the fact of appellant's continued occupation, as stated, and directing them to remove from said office all their private property and belongings enumerated, extending it to all others in like case, and that the recorder and other county officers from that date should allow no person or party to locate in their respective offices any desk, chair, bookcase or book, or other private property not belonging to and a part of said offices, and that upon failure of the owner to comply with the order within ten days from that date, the sheriff should remove all such property.

Of these resolutions appellants had due notice, but paid no attention to them. The committee on court house and grounds, of the board of supervisors, requested the recorder to remove their property, but he refused for the reason given, that he didn't believe Mr. Hallihan was interfering

with the public business in his office, and he was giving him no more privileges than he would willingly give any other citizen of the county, and had given to others. No attempt to enforce the order of the recorder or sheriff having been made, the committee so reported to the board at its July session, 1895, and were thereupon directed to take such measures as might be necessary to that end, and authorized to employ counsel to assist the state's attorney therein. Due notice and demand in writing was served upon each of the appellants to remove their said property and vacate and surrender possession of said room to the county, through said committee; and more than thirty days thereafter, they having refused so to do, this action of forcible detainer followed, which was submitted for trial by the court without a jury; and defendants being found guilty and a new trial denied, judgment was given for the plaintiff, awarding a writ of possession and costs. Exceptions were duly taken and the record is brought here for review, on appeal.

No evidence was offered to contradict any of the facts above stated, which were substantially stipulated, but the testimony of appellant Hallihan added some particulars, perhaps not very material, as follows:

The recorder's office was open from eight to twelve and from one to six o'clock. Having no key to it, he went there about a quarter after eight, and there spent pretty much all the time it was open, except when he went to other offices to look up judgments and taxes. His desk was five or six feet long and about three in width; his book case about six feet high and eighteen inches square, was kept behind one of the index desks, and not occupying any space required for public records. It was locked. Only he and his son, who was in his employ, had a key to it. He had no arrangement with the recorder for occupying any quarter of the office, nor ever assumed to occupy any particular space or part of it. Neither of the recorders objected to his being there, as he was.

It is insisted for appellants that these facts fail to show

that when this action was brought appellee had any right of possession, or appellants any actual possession of the premises, both of which must be shown in order to maintain it; that "the only way known to the law to test the question sought to be raised here is to sue the recorder, if any person conceives himself injured, when the question can be tried on its merits and the recorder compelled to do what the law requires of him;" that the plaintiff, if anything has been done in the office not authorized by law, can file its bill and a decree be procured which will protect the rights of all parties; that the recorder "is always subject to the order or decree of the courts, who can compel the performance of his duties by mandamus or injunction, which remedies can be adjusted to the particular facts, while the remedy here invoked is summary, unbending and wholly unsuited to accomplish the end intended." And further, "that the very duties imposed upon the recorder, their nature and character, make it necessary for their proper performance, that he alone should have absolute control of the recorder's office, and that no other officers should have the right to say who should come into his office, how long they should stay and what they should bring with them;" that "the recorder, in the very nature of things, is the only person who can decide whether the public interests require that certain things should or should not be done in his office."

We are not prepared to concede the soundness or even the consistency of these positions. If the rightful control of the recorder over the room which is his office is indeed so exclusive and absolute as is thus claimed, discretion would seem to be so swallowed by power that while he continues to use it for that purpose a case can hardly arise upon his manner of so using it, or its use by him or his permission for other purposes, which a court could treat as an abuse and restrain or correct by mandamus or injunction against him.

It was admitted on the trial that the court house belonged to the county. It appropriated the room in question to the official uses of the recorder. It does not attempt nor intend by this proceeding to abridge his control of it for those uses,

to say who shall come into his office, how long they shall stay or what they shall or shall not bring with them. It has no controversy with him. But while fully conceding to him the right to all such use and control of the premises as are necessary, proper or naturally incidental to the performance of his official duties, it asserts, as against all other parties and other and distinct uses, such right of possession and control as attaches to and flows from its ownership of the court house, and its corporate duties imposed by law.

Was that right such as was sufficient to enable it to maintain this action? The statute makes and declares each county a body politic and corporate. R. S., Ch. 34, Sec. 22. Among the "powers" conferred upon it are: To "purchase and hold the real and personal estate necessary for the uses of the county;" to "sell and convey or lease any real or personal estate owned by the county;" and "to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." (Sec. 24.) Being a corporation aggregate, it could possess, use, control and manage its property and funds, exercise its powers and perform its duties only through agencies prescribed or authorized by the law under which it was organized. It was accordingly provided that its powers as a corporation should be "exercised by a county board, to-wit: In counties under township organization (except the county of Cook) by the board of supervisors (Sec. 23); to which, among others, the 'powers' were given to take and have the care and custody of all the real and personal estate owned by the county, and to manage the county funds and business, except as otherwise specifically provided." (Sec. 25.) And among the duties imposed are the following: "To erect or otherwise provide, when necessary and the finances of the county will justify it, and keep in repair, a suitable court house, jail and other necessary county buildings, and to provide proper rooms and offices for the accommodation of the several courts of record of the county, and for the county board, county clerk, county treasurer, recorder, sheriff and the clerks of said courts, and to pro-

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vide suitable furniture therefor; and to provide and keep in repair, when the finances of the county permit, suitable fire proof safes or offices for the county clerk, county treasurer, recorder, sheriff and clerks of said courts." (Sec. 26.)

In respect to these powers and duties the county board is the county, and their exercise and performance would seem to necessitate a continuing right of possession. But independent of them, such right would be presumed from ownership, until it was shown to have been divested of it by some adverse and valid claim, which could arise only by operation of law or contract of the county.

It is said that the sheriff, by virtue of section 14, chapter 125, which provides that "he shall have the custody and care of the court house and jail of his county, except as is otherwise provided," is in possession of the court house as a whole; that this provision, being later and applying specially to court houses and jails, modifies, as to them, those previously referred to, which give it to the county or board of supervisors as to county property generally; that the duties and functions of the board are all legislative, and being in session only a few times and for short periods each year, is unfit to discharge the duties of such custody and control; and if it had the possession or right to the possession of the court house or jail, then in case a mob should seize either, public business must be suspended until it should meet, make demand in writing of the mob for possession, and if refused, successfully maintain a suit for forcible entry.

A glance at the statute shows that the functions of the county and the board are largely executive. They buy, care for, lease, sell and convey real and personal property, make contracts, examine and settle accounts, appoint agents, erect buildings and keep them in repair, provide rooms, furniture and other facilities for the transaction of the business of county officers, and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.

There is nothing in their constitution or methods of

proceeding that unfits them for the care and custody of a court house, more than in those of a board of directors of a railroad company to exercise a like power and perform like duties with reference to the most insignificant station house on its line. From a necessity common to all aggregate corporations they perform many of these duties through individual agents, some of whom are so exclusively qualified that they are designated and fixed by law—as the county clerk for some (Chap. 35, Sec. 10) and the sheriff for others—while still others are left to their own appointment, expressly authorized, as for the care and management of the county workhouse and county insane asylum (Chap. 34, Sec. 24), or impliedly from necessity or convenience; but all more or less under the immediate and binding directions of the board.

The statute gives to the sheriff the care and custody of the court house and jail of his county, “except as is otherwise provided.” The legislature knew it was already provided that the county should take and have it, as to all the real and personal estate owned by it, and that for that purpose the board of supervisors was the county; that nearly all the members resided and did business at considerable distances from Springfield and met there only for short periods with long intervals; so that they could not, as a body, directly give to the court house or jail the constant oversight and particular care which the public interest required, and must do so by some sub-custodian. It knew also that the sheriff kept his office in the court house, constantly attended by him in person or by deputy having the same official power, and at the jail, usually near it, an assistant jailer under him and of his own appointment. (Chap. 75, Sec. 3.) In addition to these peculiar qualifications for the position, as conservator of the peace in his county he was required to “keep the same, suppress riots, routs, affrays, fighting, breaches of the peace, and prevent crime,” and empowered to “arrest offenders on view;” and for these purposes to “call to his aid, when necessary, any person or the power of the county.” (Chap. 125, Secs. 17, 18.) There-

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fore the consequences supposed to be involved in the theory of the county's possession, if a mob should seize the court house, are not to be apprehended. In fact and law they are no more involved in that theory than in that of the sheriff's possession; for in either case, as sheriff, he could prevent them, but if he acted upon his right to possession, the demand in writing and successful prosecution of an action for forcible entry and detainer would be as necessary in the one as in the other. A custodian, as curator or janitor, of such buildings was indispensable, and for the reasons stated the sheriff was most appropriately made such *ex officio*, but there was no necessity, nor any reason, for any of the purposes of his appointment, that he should supersede the owners in their actual or legal possession. In whatever he does, touching the mere care of them, he is subject to and acts under the express or implied authority of the county board, except as to orders of the court he is attending where its convenience, dignity or duty is immediately concerned, or such order is expressly authorized by law, and never upon his own judgment as of independent right. Accordingly the statute makes it the duty of the grand jury at each term to "visit the jail and examine its condition * * * and make report thereof to the court," and of the court to see that it performs that duty. Upon such report being made, however, the court usually takes no action with reference to the "condition" reported, but its clerk is required to transmit a copy of it to the county clerk, who "shall lay the same before the county board at its next meeting." (Chap. 75, Secs. 26, 27.) Ordinarily the action of the board is sufficient to remedy any defect in the condition of the jail, whether due to a want of proper care on the part of the sheriff or any other cause; but since a considerable time may elapse before its next meeting, and they have no power to remove or punish him for disregarding their direction, it is made the duty of the court also to inquire into its condition and the treatment of prisoners, and for neglect of any of his duties under the act it may make all proper orders against him and enforce them by its process. (Sec. 28.)

The law does not recognize any estate or interest of the sheriff, possessory or other, in the court house or jail. They are purely public buildings, belonging wholly to the county as a body corporate, dedicated to public uses only, in which, therefore, while so used, no other person, natural or artificial, private or official, can have any exclusive proprietary right. The sheriff's relation to them is only that of one employed and paid to take care of them for these uses, as a part of his official duty, and all the possession he has, being merely incidental to that part of his duty, is, in fact and law, the possession of the county.

This view harmonizes the two provisions of the statute, giving to the county and to the sheriff, respectively, the care and custody of this property, and allows to each its due effect. In *Dahnke v. The people*, 57 Ill. App. 619—which is nearer to this case than any other of which we are advised—it was said that “the custody and control which the county board is entitled to exercise under the authority of the constitution and statutes is such as attaches to and flows from the ownership of the court house by the county; that of the sheriff is such as attaches to and flows from the inherent powers and duties of his office at common law, and as recognized by the constitution and declared by the statutes, as the attendant upon the court and as the court's executive officer.” And further, that “there is nothing inconsistent in the performance of such duties by the sheriff with the other duty of the county board to control and manage the property of the county and its affairs, and there is nothing necessarily antagonistic in the statutes that impose, in substantially the same language, the duty, upon both county board and sheriff, to have the custody and control of the court rooms of the county.” In that case the difficulty was not so much in the law as in its application to a condition peculiar to the county of Cook, in which there were more courts, equal in dignity and jurisdiction and having terms at the same time, than court rooms provided or the county board had means to provide for their accommodation. They made an order assigning to a judge another court

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room than the one he was occupying, and to which no other judge had a better claim by right or courtesy. Upon his refusal to make the change in compliance with such order, the board directed Dahnke, one of its employes, during a necessary adjournment of the court over an election day, and while an unfinished cause was on hearing before it, to change the locks on the doors of the court room and the judge's chambers and remove his property to the room so assigned to him. When he came to resume business pursuant to the adjournment and found the door closed, the sheriff demanded of Dahnke to open it, which he at first refused to do, but upon the sheriff's threatening to break in complied and admitted them to use the room as theretofore. The court then made an order imposing upon him a fine of \$50 as for a contempt; upon which a writ of error was prosecuted. A majority of the Appellate Court held that the action of the board was outside of its authority, and that the facts brought the case within the range of the sheriff's duties as the executive officer of the court, the protector and preserver of its dignity and the enforcer of the peace and order of the rooms in which they are held, to "provide against the court rooms which have once been set aside for the use of the courts, from being closed against such use, and from intrusion therein to the obstruction of the court's business."

This is a necessary and recognized limitation of the board's "control" of that part of the court house, occasional, temporary and for a specific public purpose which the board can not serve; but the question here presented, which is, whether the sheriff has such "possession" of the court house as to give him the sole right to maintain an action in his own name for a trespass to or forcible entry and detainer of it or any part of it, was not involved. Had it been, we are satisfied from the general views expressed in the several opinions, that the court would have held, as we hold, that he has not.

It is further claimed that if the sheriff has not, the recorder has, possession of the room here in question.

Upon what right, then, does this claim rest? Like the

sheriff he is neither the owner of the property nor the tenant, licensee or agent of the owner with respect to it; but a public officer, not appointed by the owner, but elected by the people of the county to be agent of the law for certain public purposes prescribed and limited by it. The county in its corporate capacity provided the room with furniture, books and stationery suitable for his use as such agent, and put or let him in for those purposes and those only. This appropriation of it was not a matter of contract, choice or will on its part, but of obligation imposed by the statute. The recorder's use and occupation of it, for the purposes stated, is therefore independent of the consent of the county as it also is of the authority of the sheriff or of the court. His right depends wholly upon the law which gives it, by imposing the obligation so to use and occupy it without regard to his will. But it extends no further than is necessary or naturally incidental to the performance of his official duties. Though he rightfully occupies and uses the room as his official workshop, he does not provide it for himself, pays no rent, makes no repairs, has no proprietary estate, right or interest in it, and is not even charged with the custody of it as property or the subject of property. Nor has he any interest in the proceeds of his work, nor can he fix the price of his services or refuse them to any who need and will pay the price fixed by law, for which he must account.

This special and limited use of a county room by a county officer is the actual possession of the county. It is only in some such way that the county can have it. The recorder does not need it to protect himself in his rightful use of the property. For should he be unlawfully deprived of that by a stranger the sheriff could at once restore it without process and by whatever of force should be necessary, or in case of his refusal or neglect to do so an action at law could be maintained in the name of the county; and if the county itself should wrongfully interfere with it, mandamus or injunction against the board would be his appropriate and sufficient remedy.

It is provided by statute that "all records, indices, abstract

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and other books kept in the office of any recorder, and all instruments filed for record therein shall, during office hours, be open for public inspection and examination; and all persons shall have free access for inspection and examination to such records, indices, books and instruments which the recorders shall be bound to exhibit to those who wish to inspect or examine the same; and all persons shall have the right to take memoranda and abstracts thereof without fee or reward" (R. S., Ch. 115, Sec. 21); and this is the extent of the right of the public to use or occupy this room without the consent of the county, expressed or implied. To this extent it is purely and exclusively public.

No one is by law authorized to occupy it or any part of it as his office for the regular and continuous transaction of his private business, which is just what we understand from the evidence appellants have substantially done and are doing, against the will of the county. They are there every business day and through all business hours, being out only as they would and must be from an office elsewhere. They are there to make abstracts of all the records affecting the title to all the lots and tracts of land in the county, without regard to any present actual interest in them, either in their own right or as agents, but to be prepared for business that may or may not come to them. There they keep their own private books, blanks, furniture and other means required for the transaction of their private business as abstracters and conveyancers, and there they transact it just as they would in any office owned or rented by them for that purpose. They have no other so equipped or so regularly used.

Upon the admitted facts, it is idle to insist that they use it only as all others may, under the statute, or as any other actually does. They make it their private office, no less in fact than if they advertised it as such in the newspapers, or put up a sign to that effect on the door; and this is actual "possession," at least of so much as is thus used.

But it is said they have "never claimed any sort of control over the whole or any part of the recorder's office." By this is meant only that the recorder himself does not

object, but consents to their using it as they do, which, for reasons already stated, we deem immaterial. The question of right is between them and the county, which does object, and which they resist and defy.

It is further said that they actually occupy only a part of the room, and if wrongfully, as against the county, the evidence must identify that part, and judgment be given for possession of that part only; and, therefore, that the holding of the fourth proposition of law for appellee, and the judgment here given for the whole room in accordance with it, were in the teeth of the statute and the decisions of the Supreme Court.

The statute is that "if it shall appear on the trial that the plaintiff is entitled to the possession of the whole of the premises claimed, he shall have judgment and execution for the possession thereof, and for his costs. If it shall appear that the plaintiff is entitled to the possession of only a part of the premises claimed, the judgment and execution shall be for that part only, and for costs, and for the residue the defendant shall be found not guilty." R. S., Ch. 58, Sections 13, 14. Whether the judgment and execution should be for the whole or only a part of the premises claimed, if either, is thus made to depend not on the extent of the defendant's actual possession, but on that of the plaintiff's right of possession. We are not advised of any decision or *dictum* of the Supreme Court to the contrary. Appellee claimed the whole, and it appeared to the court on the trial that it was entitled to the possession of it, as against appellees. It so appears to us, and we hold the judgment was proper.

Its execution need not disturb the recorder, nor interfere with the common right of appellants to have free access to the records, indices, books and instruments filed or kept by the recorder in his office, for inspection, examination and taking memoranda and abstracts thereof. The sheriff will dispossess the defendants and restore the county to the possession claimed, by removing from the office the private property, by the means and use of which they now have it, as he would if they were keeping a lunch counter there by

removing the counter, provisions, safe, stools and other furniture used in keeping it. He will encounter no more difficulty in identifying the property to be removed than he would in executing a fieri facias.

We think the evidence clearly brings the case within the scope of this remedy as extended by the act of 1872, section 2, clause 2. *Thomasson v. Wilson*, 146 Ill. 384 (392). The judgment will be affirmed.

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**John I. Chambers, Receiver, etc., v. Pattie S. Prewitt
et al.**

1. *SUBROGATION—Principal and Surety—Security for Payment of Debt and Protection of Surety.*—Whether creditors can avail of a mortgage or other security given by a debtor to his surety depends upon the purpose for which it is given. If that be purely personal as only to indemnify the surety, they can not do so until he is actually damnified, or at least has become absolutely liable for the debts; for they must claim through him by subrogation, and until then he himself has no remedy upon it. But if given for the better security of the debts themselves—as for their payment by the principal debtor, or to provide the surety with means to pay them in case of his default—then, although the purpose is also to indemnify the surety to the same extent, a trust attaches to the security for the benefit of the creditors indicated, to which the court will give effect.

2. *MORTGAGES—A Mortgage Construed.*—A and B, his wife, executed a mortgage substantially as follows: "The mortgagors, A and B, his wife, mortgage and warrant to C and D to secure the payment of the following described promissory notes, to wit" (here followed a description of certain notes payable to E). "The following described real estate * * * all of which above described notes have been guaranteed by the said C and D, and when each and all of which shall have been duly paid by said A, together with any other sums for which said C and D or either of them may be liable, either as surety or guarantor of and for the said A, the said C and D shall and will reconvey the above described premises to the said A." *Held*, that the mortgage was a security for the payment of "any other sums for which the said C and D or either of them" might be liable as well as of the notes held by E, and that the proceeds of a foreclosure should be applied pro rata on all unpaid debts of A for which C and D were liable.

3. *SAME—Weight to be Given Condition in Construction of.*—The

purpose of a mortgage is most certainly manifested by the condition on which it is to become void, for its whole and sole purpose is to secure the performance of that condition, and other parts should be considered in connection with it, to assist, if necessary, in the ascertainment of its meaning.

4. *PAROL EVIDENCE—When Admissible to Explain a Written Instrument.*—Parol evidence tending to vary or contradict the plain meaning of a written instrument should not be considered, but so far as it tends to identify a subject-matter referred to in general terms in the instrument, or by showing the situation, condition and mutual relations of the parties to it, makes clear their meaning by the language used, when from the language alone the meaning might be uncertain, it is competent. The court in order the better to understand the instrument in such a case will seek to place itself in the situation of the parties.

5. *RES JUDICATA—Effect of Decree Against Trustees, on Rights of Cestui Que Trust.*—A executed a mortgage to B and C to secure debts to D, and to others to whom B and C were liable as securities for him. D filed a bill and secured a foreclosure of the mortgage, and at a later date E, F and G filed a bill against him and A, claiming, as others to whom B and C were liable as securities for A. It was contended that the decree in favor of D was a bar to E, F and G, though they were not parties to the suit because they claimed under B and C who were. *Held*, that they did not so claim, that their right was derived directly from the mortgage, and that B and C were trustees, and as such were powerless, by any act or default of their own, to release or prejudice the rights of E, F and G.

Mortgage Foreclosure.—Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

EDWARD P. KIRBY, attorney for appellant.

PATTON, HAMILTON & PATTON, attorneys for appellees.

Parol testimony may be resorted to for the purpose of ascertaining the nature and qualities of the subject to which the instrument refers. 1 Greenleaf on Evidence, Sec. 286; Doyle et al. v. Teas et al., 4 Scam. 202; Turpin, Receiver, v. B. O. & C. R. R. Co., 105 Ill. 11; Brand v. Henderson, 107 Ill. 141; Wilson v. Roots, 119 Ill. 379.

When there is any uncertainty respecting the terms of a written agreement and the parties to it have, by their own conduct, placed a construction upon it which is reason-

able, such construction will be adopted by the court. *People ex rel. v. Murphy*, 119 Ill. 159; *Burgess v. Badger*, 124 Ill. 288; *Home National Bank v. Estate of Waterman*, 30 Ill. App. 535.

When a contract fails to designate a payee or beneficiary by name, but describes him as one of a class, parol evidence is admissible to show who was intended. *Railway P. & F. C. M. A. & B. Ass'n v. Loomis*, 142 Ill. 560.

Courts, in construing written contracts, endeavor in all cases to place themselves in the position of the contracting parties, so that they may understand the language used in the sense intended by the persons using it. *Wilson v. Roots*, *supra*; *People v. Murphy*, *supra*.

There is no principle more firmly established in our equity jurisprudence than that the rights of one interested in a matter can not be affected by a proceeding in which he is not a party. *Howell v. Foster*, 123 Ill. 276; *Dorman v. Brereton*, 140 Ill. 153; *Palmer v. Woods*, 149 Ill. 146.

The complainants are entitled to their day in court, which they have not had until now.

The mortgagees are trustees for the holders of all of John P. Smith's paper guaranteed, secured or indorsed by them, upon an equal basis, and one of the holders should not be allowed to obtain an unjust and inequitable advantage of the others through the door of a court of equity. The doctrine of *res judicata* has no application to this case. A judgment or decree is no bar as to matters not put in issue. *Bently v. O'Bryan*, 111 Ill. 60; *City of Chicago v. Cameron*, 120 Ill. 451; *Dulin v. Prince*, 29 Ill. App. 209.

There was no issue as to whether these notes were included in the mortgage, in the adjudication in the *Wilson* case. None was presented by the cross-bill, although the bank had notice of them. Appellees had no notice of the cross-bill of appellants in the *Wilson* case, and the mortgagees themselves had no actual notice of it.

In the foreclosure of a deed of trust, the *cestuis que trust* as well as the trustee should be parties to the proceeding. *Chicago, etc., v. Peck*, 112 Ill. 408.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

In March, 1885, John P. Smith borrowed of George and Hiram Wilson, partners, \$22,500, giving his notes therefor and executing a mortgage upon his farm of 770 acres in Sangamon and Morgan counties to secure their payment.

Afterward, he became indebted to the Central Illinois Banking and Savings Association (commonly known as the Central Bank) of Jacksonville, on notes and overdrafts, for the payment of which his brothers, James D. and Lloyd B. Smith, were sureties, and which on February 2, 1893, upon an accounting between the parties, were agreed to amount in all to \$34,500. Thereupon, he made his four notes—one for \$4,500 at three months, and three for \$10,000 each, at six, nine and twelve months, respectively, from that date, with interest at seven per cent., payable to his own order, which he indorsed and delivered to William E. Veitch as cashier of said bank.

In connection with the making and delivery of these notes though at a later date—April 13, 1893—in pursuance of a previous agreement of the parties concerned, James D. and Lloyd B. Smith executed to the bank a separate contract, guaranteeing their payment, and John P. Smith and wife executed to them a second mortgage of his said farm, the material parts of which are as follows:

“The mortgagors, John P. Smith and Anna Smith, his wife, mortgage and warrant to James D. Smith and Lloyd B. Smith, to secure the payment of the following described promissory notes, to wit:” (Here follows a description of the four notes given to the bank as above stated) “the following described real estate,” (here follows a description of the lands) “all of which above described notes have by the maker, the said John P. Smith, been duly executed, indorsed and delivered to *bona fide* holders for valuable consideration, and the payment of each and all of which have been guaranteed to the holders thereof by the said James D. Smith and Lloyd B. Smith, and when each and all of which shall have been duly paid by said John P. Smith, together

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with any other sums for which said James D. Smith and Lloyd B. Smith or either of them may be liable, either as surety or guarantor of and for the said John P. Smith, the said James D. Smith and Lloyd B. Smith shall and will reconvey the said above described premises to the said John P. Smith or to his heirs or assigns, dated the 13th day of April, A. D. 1893.

(Signed) J. P. SMITH. [SEAL.]

ANNA SMITH. [SEAL.]

This mortgage was delivered by the attorney for the bank, who prepared it and the guaranty contract in the latter part of May, 1893, to the mortgagee James D. Smith at his house in Island Grove, Sangamon county, for his firm and by him given back to the attorney to be deposited in the bank. Before and when it was delivered the mortgagor was indebted to appellees Pattie S. Prewitt, Annie L. Johnson and William M. Warren, upon his notes held by them respectively, on each of which the mortgagees were sureties; and these notes, together with those given to the bank, constituted the entire amount of his indebtedness.

A bill was filed to the November term, 1893, of the Circuit Court of Sangamon County, to foreclose the Wilson mortgage, to which the mortgagors and the second mortgagees, were made parties defendant and duly served with process. While that suit was pending, appellant Chambers and William E. Veitch, who had been appointed receivers of the bank, obtained leave to be made defendants also and filed with their answer a cross-bill against the complainant and all of the defendants in the original bill. In the latter, as in their answer, they set up the several transactions above stated between John P. Smith, his brothers named and the bank; that none of the notes of said John P. Smith held by the bank had been paid; that the mortgage to his brothers was given especially to secure their payment and had been redelivered by the mortgagees to the bank for that purpose, and that the receivers hold said notes and mortgage as assets of the bank, with authority to institute suits for their collection; and prayed that

an account be taken of the amount due thereon; that they be subrogated to all the rights of said mortgagees; that John P. Smith be required to pay them the amount found due, and that in default thereof the mortgage be foreclosed, the land sold, the equities of the different parties interested determined, and the proceeds of the sale applied to the payment of said four notes in the order of their maturity.

The original defendants failed to answer either the original or cross-bill, both of which were therefore taken as confessed by them, and on final hearing a decree was entered on December 16, 1893, finding the amount due on the Wilson mortgage to be as claimed, and declaring it a first lien on the mortgaged premises, and on the cross bill that the second mortgage was given for the benefit of the bank, subrogating the receivers to the rights of the mortgagees therein, ascertaining the amount due on the said four notes, and ordering that the premises be sold and the proceeds applied first, to the satisfaction of the Wilson mortgage, and second, to the payment of the amount found due on the four notes held by the receivers in the order of their maturity. The mortgaged premises were not of value sufficient to pay the mortgage debts. They were not sold under the decree, but the receivers obtained from John P. Smith a deed releasing his equity of redemption in consideration of the surrender to him of all the claims of the bank against him.

At the September term, 1894, the appellees herein—James D. Smith, Lloyd B. Smith, Pattie S. Prewitt, Annie L. Johnson and William M. Warren—exhibited in the Circuit Court of Sangamon County their bill in chancery against John P. Smith, Anna Smith, his wife, and the receivers named, setting up the two mortgages, the decree upon the bill and cross-bill in the Wilson case, the conveyance from John P. Smith to the receivers, and their possession of the mortgaged premises, alleging that when the second mortgage was executed the complainants, Prewitt, Johnson and Warren, respectively, were creditors of the mortgagor on his notes, upon which the mortgagees were liable as sureties, and under said mortgage were entitled to share pro

rata with the bank in the proceeds of the mortgaged premises, over and above the amount necessary to satisfy the Wilson decree, and praying that an account be taken of the amounts so due them, respectively, and a decree against John P. Smith for the payment thereof; and that, in default of such payment, the mortgaged lands be sold, and the surplus proceeds, after the payment of Wilson, be applied pro rata to the amounts due to the bank and to said other creditors. The defendant Smith was defaulted, and the bill taken *pro confesso* against him. The receivers answered, contesting the claim of said complainants Prewitt, Johnson and Warren. In the meantime, under a stipulation between the complainants and defendants, part of the lands were sold by the receivers, and certain notes given for the purchase money placed in the hands of Edward P. Kirby to await the final determination of the suit. The Circuit Court held that the complainants, Prewitt, Johnson and Warren, were entitled to share in the surplus proceeds, and directed Kirby to collect and pay over to them respectively, pro rata.

Veitch having resigned, John J. Chambers was, by order of the court, permitted to prosecute an appeal as receiver alone, and accordingly he brings the record here for review.

The contending parties were and are alike creditors of John P. Smith, for whose claims respectively his brothers, James D. and Lloyd B. Smith, were also liable as guarantors or sureties. In view of this contingent liability, and to protect them ultimately against loss by reason of it, as far as he thereby might, he executed to them the mortgage in question. The creditors are seeking to reach this security as a means of satisfying their claims—the receiver, representing the bank, insisting upon priority, and the others upon equality pro rata.

It seems to be well settled that whether creditors can so avail of a mortgage or other security given by a debtor to his surety depends upon the purpose for which it is given. If that be purely personal, as only to indemnify the surety, they can not do so until he is actually damnified, or at least has become absolutely liable for the debts; for they must

claim through him by subrogation, and until then he himself has no remedy upon it. Brandt on Suretyship and Guaranty (2d Ed.), Vol. 2, Sec. 326; Ohio Life Ins. Co. v. Reeder, 18 Ohio, 35; Osborn v. Noble, 46 Miss. 449, and cases there cited.

But if given for the better security of the debts themselves—as, for their payment by the principal debtor, or to provide the surety with means to pay them in case of his default—then, although the purpose is also to indemnify the surety to the same extent, a trust attaches to the security for the benefit of the creditors indicated, to which the court will give effect. Moses v. Murgatroyd, 1 Johns. Chy. 119; Homer v. Savings Bank, 7 Conn. 484; Osborn v. Noble, *supra*; Paris v. Hulet, 26 Vt. 308; Eastman v. Foster, 8 Metc. 19; Aldrich v. Blake et al., 134 Mass. 582; Brandt on S. & G., Secs. 282-285.

The controversy here is mainly over the construction of the mortgage. For appellant the contention is that it was given as security for the notes held by the Central Bank, and only as indemnity to the sureties on the others, and appellees, admitting the provision for the bank notes, as claimed, insists that the same was made for theirs.

Appellant bases his construction upon the terms of the instrument, and the points of expression claimed to show a distinction made between these debts, as summarized by counsel, are the full description of the bank notes only; the express statement that it was given to secure their payment; that they are the first mentioned; the definite statement of the liability of the mortgagees as sureties thereon, and the fact that no other obligations of the mortgagors are mentioned as actually existing. The truth of these recitals is undisputed, but so far as they may seem to distinguish the bank debt in its favor, they are made insignificant by the parol proof which shows that the mortgage was given at the instance of the bank alone, whose claim was more than three times as large as all the others combined; that it was drawn under the direction of its cashier, in the absence of the parties thereto and by its own attorney, who had its notes and

so could describe them fully, and knew by information of the mortgagor that other notes against him were then outstanding, on which his brothers were liable as sureties, but did not know any further particulars, and for that reason only, as he testified, did not put them in. John P. Smith testified that besides the notes involved in this suit there was no paper out against him on which his brothers were sureties.

Other parol evidence, the admission of which was objected to, and is assigned for error, was to the effect that for a considerable time before the instrument in question was executed, the cashier and attorney were pressing Smith to make a mortgage directly to the bank to secure its notes, which he persistently refused to do on the sole ground that he was indebted on other paper, also signed by his said brothers as sureties, which he should secure as well, but expressed his willingness to execute such a mortgage as he now understands this to be; that when it was shown to him by the cashier he made some objection and wanted explanation, for which he was referred to the attorney, who testified that the explanation wanted was of the defeasance, and that Smith asked him "whether it furnished indemnity and security for all his paper."

He must have known that his answer was understood to be affirmative, for upon it Smith consented to execute the mortgage as it was drawn and now appears.

If, and so far as this or any parol evidence tended to vary or contradict the plain meaning of the written instrument, it was not proper to be considered, and there is no presumption that any such was considered by the court. But so far as it tended to identify the subject-matter referred to in general terms in the instrument or by showing the situation, condition and mutual relations of the parties to it makes clear their meaning by the language used, which from it alone might be uncertain, it would be competent. The court, in order the better to understand the instrument in such case will seek to place itself in the situation of the parties. *Wilson v. Roots*, 119 Ill. 379; *Burgess v. Badger*, 124 Id.

288; Home National Bank v. Estate of Waterman, 30 Ill. App. 535. The bank was not a party to it, but claimed it had a certain meaning to its advantage. Could it well complain of the court's knowing and holding as the true construction what the parties themselves alike intended and understood by it, if it was reasonable though not clear from the language itself? Ibid.

But we see nothing uncertain in the terms of the contract. Its meaning seems unmistakable, needing no aid upon any point from parol evidence, and making no room for construction. With that meaning the testimony objected to is entirely in harmony. The expressions referred to and relied on as favoring the bank's view of it could not give to that creditor any priority of right over others whose claims are by it placed in the same category, so far as respects the moral obligation, legal liability and actual intention of the mortgagor.

The purpose of a mortgage is most certainly manifested by the condition on which it is to become void, for its whole and sole purpose is to secure the performance of that condition. Other parts should be considered in connection with it to assist, if necessary, in the ascertainment of its meaning. But nowhere in the one before us is there a word expressive of a purpose to indemnify the sureties, as distinct from that of securing the debt or addition to it. Though drawn by a learned and able lawyer, it contains no language, technically or commonly employed, to express a contract for indemnity. Certainly the performance of the condition would have indemnified them, and because that effect was certain and palpable, a distinct purpose of the mortgagor to produce it must be admitted as a necessary implication from the statement of their contingent liability for the debts. That implication, however, is just as true of the claims of the bank as of the appellees, and therefore gives no precedence to either. Allowing it all the force of an expressed purpose to indemnify the sureties it would not bar the claim of either of those creditors to share in the proceeds of the security as a *cestui que trust*, if the mortgage was given to secure the debt also.

That it was so given is conclusively shown, by the condition which provided that the mortgaged premises should be reconveyed to the mortgagor, his heirs or assigns, "when each and all of which" (being the four notes held by the bank) "shall have been duly paid by said J. P. Smith" (the mortgagor and principal debtor), "together with any other sums for which said James D. Smith and Lloyd B. Smith" (the mortgagees and sureties), "or either of them, may be liable on, either as surety or guarantor of and for the said John P. Smith." Under the class description naming the principal debtor and sureties, the notes held by appellees could be as easily and certainly identified as if the date, payee, amount, when due, and rate of interest of each, had been added; for it includes, without exception, all debts of the class so described.

This condition would be broken by default of the mortgagor in the due payment of any such debt, and the mortgage subject to foreclosure, though the surety had not been damnified, or had been discharged from liability by some statute of limitation, or by an extension of the time of payment by the creditor without consent of the surety, or otherwise, and whether the mortgage was executed when or after the debt was contracted, or the creditor had or had not any knowledge of its existence. The proceeds of the foreclosure sale would be applied in due proportion on the unpaid debt, and such application would be made by the mortgagees, not of their own will, but by force of the mortgage. Thus it is shown by its terms and operation that the mortgage, whatever else may have been an ultimate object, was a provision for the payment alike of all the debts referred to by the mortgagor, or out of his means as far as they would go, and that the mortgagees were trustees for the creditors. The notes held by the appellees, respectively, were all given before the mortgage was executed, and matured later than any or some of those held by the bank. Both the attorney and the cashier knew of the existence of some such indebtedness as, for all purposes of security, was linked to the notes it held, by terms as plain

as could be used—"together with"—and so were put upon inquiry as to its amount and other particulars which would have led to certain and definite information. The bank, therefore, can not justly complain of any wrong done by giving due effect, in the interest of appellees, to the instrument prepared by its own representative, and which was, in our opinion, to protect and secure on equal terms, *pro rata*, all the notes involved in this suit.

It is further contended that the decree on the cross-bill in the Wilson case is *res adjudicata* against appellees Prewitt, Johnson and Warren, though they were not parties to the suit, because they claim under and through James D. and Lloyd B. Smith, who were.

But they do not so claim. The relation they sustain to them is not that of privies in estate but of *cestuis que trust*. Their right is derived directly from the mortgage, and the trustees were powerless by any act or default of their own to release or prejudice it.

For the reasons stated the decree will be affirmed.

Jeremiah H. Williams v. Daniel Watson.

1. INSTRUCTIONS—*The Jury Should be Instructed as to All Issues Raised by the Evidence.*—The evidence in this case fairly presented the questions whether the relation between appellee and defendant in the attachment was that of debtor and creditor or principal and agent, whether the transfer to appellee was fraudulent as against appellant, and whether under all the circumstances appellee should be deemed estopped to claim the property in controversy as against appellant, and the refused instructions which advised the jury as to the legal principles applicable to these issues should have been given.

Attachment.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

SALMANS & DRAPER, attorneys for the appellant.

W. J. CALHOUN and H. M. STEELY, attorneys for appellee.

OPINION PER CURIAM.

Appellant, a farmer, on the 14th, 15th and 16th of October, 1895, sold and delivered 4,080 bushels of corn to one Lester Andrews, for which he was to receive payment by checks upon the bank of the appellee.

On the 17th of October, 1895, Andrews departed to unknown parts, and on the 22d day of the same month appellant sued out a writ of attachment against Andrews to recover the amount due for the corn and caused levy thereunder to be made upon the grain found in the elevator wherein Andrews had transacted the business of a grain buyer.

Appellee, by way of interpleader in the attachment proceeding, claimed to be the owner of the grain levied on, and on trial of that issue prevailed.

This appeal is from the judgment thus rendered in favor of appellee.

It appeared appellee was a banker, and owned an elevator, and that Andrews operated the elevator and bought grain with money supplied by appellee under an arrangement between them, the exact nature of which presented a question of fact for the consideration of a jury.

Appellee claimed Andrews was his debtor for money advanced to enable him to carry on the grain business, and that Andrews just before departing from the country, sold and delivered the grain to him in discharge, or partial discharge, of the indebtedness.

As the case must again be heard we refrain from commenting upon the testimony relating to transactions between appellee and Andrews further than to say it presented fairly the question whether the relation between them was that of simple debtor and creditor or principal and agent, and whether the transfer of the grain to appellee was free from the taint of actual or constructive fraud as against the appellant, and also the question whether under all the

circumstances appellee should be deemed estopped to claim the ownership of the grain as against the claim of the appellant, which was for the purchase price of grain which went into the elevator, and which, in part at least, was received by appellee in the transfer from Andrews.

The court refused two instructions which advised the jury as to legal principles applicable to the points mentioned herein and which are not touched upon in other instructions.

The jury should have been advised in these respects.

Altogether we are unable to assent to an affirmance of the judgment, and think the ends of justice require the cause should be again heard by a jury.

The judgment is reversed and the cause remanded.

71	132
172*	511
71	130
84	290

Metropolitan Accident Association v. Amanda Taylor.

1. **INSURANCE—*Special Exceptions in Accident Policies.***—No reason is perceived why an accident insurance policy may not make a special exception of a class of injuries, however general the description may be, provided only that it distinguishes the one intended from others, and admits of proof to identify a particular case as falling or not falling within it.

2. **SAME—*Voluntary Exposure to Unnecessary Danger.***—An accident insurance contract provided that its benefits should not extend to death or disability happening directly or indirectly in consequence of voluntary exposure to any unnecessary danger. The insured sat down on the track of a railroad in active operation and was run over and killed. *Held*, that there were conditions on which his removal in good time might absolutely depend, but which could not be certainly foreseen; that this uncertainty made the position one of danger, and that the insurance company was not liable.

3. **SAME—*The Phrase "Walking on the Road-bed of any Railroad" Construed.***—An accident insurance contract excepted from its operation injuries received by the insured while "walking on the road-bed of any railroad." *Held*, that the limitation of this exception to the act of walking in its strictest sense was improper and that it should be construed to include running, using the road bed as a footpath, and even stopping on it in the course of such use with the intention of pursuing the journey thereon when the occasion for such suspension had passed.

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Assumpsit, on an insurance policy. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Reversed with finding of facts. Opinion filed June 16, 1897.

SMITH, SHEDD, UNDERWOOD & HALL, attorneys for appellant.

The insured died from voluntary exposure to unnecessary danger, and, therefore, can not recover. *Chicago & A. R. R. Co. v. Logue*, 158 Ill. 626; *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175; *Sawtelle v. Railway Passengers' Assurance Co.*, 15 Blatchford, 216; *Standard Ins. Co. v. Langston*, 60 Ark. 381 (30 S. W. Rep. 427); *Follis v. United States Mutual Accident Ass'n (Iowa)*, 62 N. W. Rep. 807; *Smith v. Preferred Mut. Acc. Ass'n*, 62 N. W. Rep. 990; *Cornish v. Accident Ins. Co.*, 23 Law Reports, Q. B. Division, 453.

The insured died, while, and in consequence of walking on the road-bed of a railway, and, therefore, can not recover. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; *Piper v. Mercantile Mutual Acc. Ass'n*, 87 N. E. Rep. 759; *Keene v. New England Mut. Acc. Ass'n*, 41 N. E. Rep. 203.

DUNDAS & O'HAIR and SYDNEY A. EADS, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellant is a mutual benefit association, organized under the act of July 18, 1883. On the 9th of January, 1894, it issued its certificate of membership to Homer R. Taylor, of Brockton, Illinois, who is alleged to have been killed by an engine of the C. & N. W. R. R. Co., near the city of Clinton, Iowa, on the 5th of August, 1894. Appellee, his mother, named in said certificate as beneficiary in case of his death, brought this action thereon, which was tried by the court without a jury, and resulted in a finding and judgment in her favor for \$1,053.33; from which judgment on exceptions duly taken, this appeal is prosecuted.

The case was submitted on a stipulation, together with

depositions of the engineer and coroner, showing the facts to be as follows:

About seven o'clock in the morning of the day mentioned, deceased, with two companions, started from Clinton to go to the next town, walking upon the railroad track, and so continued for about three miles, when his companions left him upon the track to go to a farm house about an eighth of a mile distant, for something to eat. He declined to go with them, but said he would wait for them, and the intention was, upon their return, to prosecute their journey together. He then appeared to be in good health. They left him at about the place where a few minutes afterward he was struck by the locomotive and found dead. He was not again seen until discovered by the engineer on the train coming from the west with a speed of forty or more miles per hour.

The place of the accident was on the main line of the Iowa Division, between Clinton and Council Bluffs, over which, double tracked, thirteen regular trains each way passed every day, and often as many extras, all of those going east running on one track and of those going west on the other, unless through special orders. For a mile each way from that place the tracks are straight, with nothing on or very near the right of way to obstruct the view for that distance in either direction. It was fenced on both sides, the nearest opening being a highway crossing five or six hundred feet distant.

On the occasion in question the approaching train was on the north track. When about three-quarters of a mile away, the engineer first observed something on the track ahead, but until he was within four hundred feet of it, he did not know it was a man. Taylor was then sitting on the north rail and facing southeast—not directly across the track, but with his back partially turned in the direction from which all trains on that track approached—his legs stretched out, his arms on his knees and his head hanging down between his legs. The engineer did not notice that he looked toward the engine or raised his head, or moved in any way.

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The coroner, a physician of twenty-two years' practice, upon a personal examination within three hours after the accident, found both legs and the back of deceased broken, his skull crushed and bowels exposed, injuries which, being quite sufficient, he very naturally understood to have caused his death, and that "his system and person were entirely free from intoxicating beverages."

By the terms of the certificate, the application therefor and the by-laws of the association are made a part of it; and the by-laws declare that "the certificate shall provide against all forms of bodily injuries induced by external, violent and accidental means, except as follows:

The benefits under the certificate * * * shall not extend to * * * death or disability happening directly or indirectly in consequence of disease or bodily infirmity, * * * or by voluntary exposure to any unnecessary danger * * *

The following hazards are risks not contemplated or covered by this insurance, and no sum whatever shall be paid for any injury received while thus exposed or in consequence of such exposure, to wit: walking on the road-bed or bridge of any railroad," and others specified.

The technical points against the judgment, based on provisions of the certificate, and by-laws relating to notice and proofs of injury, surgeon's certificate, and time of bringing suit, were so well answered that we think it unimportant to refer to them particularly. Nor do we see any material error of the court as to the law. But we do not concur in the finding of the issues on the evidence. Since it was all in writing the trial judge had no better means of determining its weight than has this court.

The first question arising upon it is whether Taylor's death was due to "external, violent and purely accidental" causes.

Upon the assumption that he was alive until the engine struck him, the coroner's statement would be a conclusive and affirmative answer. And that assumption on his part was entirely natural. But was it warranted? His examina-

tion of the body was made within three hours after the accident, and it does not appear, nor is it to be presumed, that either at any time before, or when his deposition was taken, he had any knowledge or information of the facts testified to by the engineer, who doubtless went on with his train. How are these unquestioned facts to be explained? Suicide, of which there is neither claim, proof nor legal presumption, is out of the question. Was he asleep? He was a young man, apparently in good health—according to his application—by occupation a farm hand and tile ditcher, and handled, in business, agricultural implements and horses. Such men usually go to bed early and sleep soundly. They are not apt to be drowsy at eight o'clock in the morning of an August day. That he did not go with his companions for food was probably because he had breakfasted at Clinton, and was ready for work until noon. A walk of three miles ought not to have fatigued him or made him drowsy. Had he felt inclined to take a nap while they were gone, would he have chosen a sitting posture on the rail of a track upon which he must have known that trains frequently passed, rather than to lie down in the shade of a fence, when the morning was bright and clear and the grass probably dry? Moreover, had he so strangely chosen, and been drowsing or asleep, it is well nigh certain that he would have been aroused sufficiently to make some visible motion, if not to get off the track, by the noise of the coming train, the vibration of the rail on which he sat, and the whistle blown for the highway crossing five or six hundred feet east of him.

If he was awake, but paralyzed, it would seem to have been a case of paralysis instantly so complete and total as to deprive him of all power of motion in every part—head, trunk and limb; which we apprehend is quite as seldom met with in temperate men of his age and mode of life as apoplexy, or failure or organic affection of the heart, causing sudden death.

In cases of transient fainting or prostration, consciousness is very rarely if ever lost without some warning, and is soon

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recovered, with power to move. How long it was before the engine struck him that Taylor lost it, the evidence furnishes no means of determining. It appears to have been not less than one minute, for the engineer saw him at a distance of nearly a mile, but it may have been twenty or more—ample time for recovery, from such a fit or spell, of both consciousness and power of motion; and if he had been warned by premonitory sensations he would have gotten off the track. Nothing whatever was shown respecting his companions after they left him as above stated.

From the circumstances mentioned, and which are all that appear, we are satisfied that to wait for their return he sat down for rest on the only thing about him that was enough above the general surface to make a seat, expecting to see any approaching train or engine for a mile and get out of its way; and from the time, the place, the position of the body and the absence of every appearance of life when, if living, some such would almost certainly have been shown, are inclined to believe that while so sitting and expecting, he suddenly expired from some brain or heart trouble, and was dead when the engineer first saw him, rather than that he remained on the track as so seen, because of any temporary inability to get off.

But if he was killed by the train, appellant claims that the evidence showed his death was the result of his voluntary exposure to that unnecessary danger, and upon that evidence the finding and judgment should have been for the defendant, under the clause quoted from the by-law which excepts every case of death or disability so resulting from all benefits under the policy of insurance. To which appellee, admitting that the by-laws, so far as valid and operative, constituted a part of the policy or certificate of membership and were binding upon both the parties, answers, first, that the clause referred to was abrogated or waived as to Taylor by what is called the "blanket provision" in the certificate itself, and is as follows: "It is hereby expressly understood and agreed that the benefits of this

insurance shall not be limited to those accidents occurring in the occupations herein given, but in addition thereto this insurance shall extend to and cover any of those accidental injuries common to all men, not specially excepted; which may occur to the insured while not engaged in his occupation." The point made is that accidents can not be "specially excepted" by so general a description as is given by the by-law. In the argument the proper definition of a "specially excepted injury" is assumed to be "an injury which is excepted either upon account of the special act which caused it, or else upon account of the special nature or character of the injury itself;" and hence it is said that while the by-law would except this case, notwithstanding any proof that the death was induced by external, violent and accidental means, if it resulted from such voluntary exposure to the danger, the blanket provision would cover it, notwithstanding such exposure, if it was produced by such means, because it is not "specially excepted," either by the by-law or the certificate of membership; and that in case of such contradiction or inconsistency the certificate must prevail.

We do not accept the proposed definition as correct, nor see any inconsistency between the two provisions. No reason is perceived why there may not be a special exception of a class, however general the description given may be, provided only that it distinguishes the one intended from others, and admits of proof to identify a particular case as falling or not falling within it. The term "specially" was probably here used in the sense of "expressly."

We also find that the unquestioned facts in this case brought Taylor within this special exception. He took, to occupy for an indefinite time, a position that was dangerous in itself—seated on the track of a railroad in active operation, on which many trains, regular and extra, passed every day. The danger was that he might be struck by one of them. He did not expect that danger to overtake him. Those who expose themselves seldom do, and for that reason so expose themselves. But he did not know when the first

to pass would come. He did know that if it should pass while he so remained it would strike him. He could not know that nothing would happen in the meantime to suspend his power or prevent him from using it in time to get off the track, or that any one else would be at hand to assist or remove him. These were conditions on which his removal in good time might absolutely depend, but which could not be certainly foreseen; and this uncertainty made the position actually taken one of danger.

However few and remote the chances against him may have appeared to be, he knew they might be more and nearer than appeared, and should be charged with taking them all as they proved to be. That other and intervening causes—whether the negligence of a third person, an inevitable accident, or an inanimate thing—were required to bring about the unfortunate result can not relieve him from responsibility for his own negligent exposure, without which they could have had no operation to produce it. That exposure, placing him in danger of their occurrence and effect, must be regarded as a proximate cause of the injury. *Village of Carterville v. Cook*, 129 Ill. 152; *Pullman Palace Car Co. v. Laack*, 143 Id. 261.

That this danger was "unnecessary" in his case, is too obvious to require argument.

The efficient and essential contributory part he took in exposing himself to it was voluntary. When he was able, physically, to sit down on the rail and stretch out his legs, he must have been able to step over it and so put himself out of danger from a passing train. When his companions left the track to get a breakfast he refused to accompany them, though apparently in good health, and said he would wait there for them. There could have been no clearer manifestation of his will and preference to stay where he was until their return—on the track.

It is said that his death was not due to his being voluntarily there so long as he had any volition, but to his remaining on it after he lost his volition. The question here, however, is not as to his volition with reference to

the actual occurrence of the injury, but to his exposure to it. Had an action been brought by an administratrix against the railroad company upon the facts here shown and clear proof of negligence (not gross) on the part of the engineer, would not the court hold it to be a case of contributory negligence on the part of the deceased in voluntarily taking the position he did, and that his loss of volition while in it was immaterial? We can not disconnect the "being" from the "remaining" on the track as the cause of death, although the remaining was involuntary in this case. The suggestion of such a disconnection treats it as if Taylor, being in a safe place, had lost his volition and in that condition gone upon the track—which is radically different.

Much that has been said applies with equal force to the question whether the injury was received "while or in consequence of his exposure in walking on the road-bed of the railroad." We dissent from the limitation of this exception to the condition or act of "walking," in its strictest sense, and think it includes running, using the road-bed as and for a footpath, and even stopping on it in the course of such use—as to tie a shoe, talk with another, or rest for a time, standing or sitting, but intending to pursue the journey thereon when the occasion for such suspension is passed.

Perceiving no preponderance of evidence against the conclusions above indicated, we find that the death of the deceased was in consequence of bodily disease or infirmity, or was due to his voluntary exposure to unnecessary danger, and while or in consequence of walking on the road-bed of the Chicago & Northwestern Railroad.

Wherefore the judgment of the Circuit Court will be reversed, and the clerk will recite in the record of this judgment the facts found as above stated. Judgment reversed.

SPECIAL FINDING OF FACTS TO BE INCORPORATED IN THE
JUDGMENT OF REVERSAL.

Upon consideration of the evidence contained in the record herein this court finds the deceased, Homer E. Taylor,

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came to his death in consequence of bodily disease or infirmity or by reason of his voluntary exposure to unnecessary danger.

Wherefore the judgment of the Circuit Court herein is reversed.

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**People, etc., Use of the Phoenix Nursery Company, v.
Harry K. Midkiff et al.**

1. **CONSTRUCTION**—*Entire Instrument Should be Considered.*—In a suit involving the ownership of certain property and turning upon the construction of a written contract, it is for the court to determine, as a question of law, the relation between the parties with reference to the property involved, upon a construction of the entire instrument, fairly considering all its provisions.

2. **CONTRACTS**—*A Contract Construed.*—The court holds that the contract out of which this suit arose was a contract of sale, subject only to the right of the vendor to retain possession of goods sold in case the vendee failed to pay for same, and that the vendor waived the security of this provision when it divested itself of possession.

3. **POSSESSION**—*Transfer of, by Delivery of Bill of Lading.*—By indorsing to a vendee, a bill of lading for goods shipped by freight, the vendor transfers to him the possession of the goods.

Debt, on a constable's bond. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

T. F. SMITH and A. E. DEMANGE, attorneys for appellant.

MILLS BROTHERS and J. M. GRAY, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action of debt brought by appellant against Harry K. Midkiff and the sureties on his official bond as a constable. The breach assigned was his levying of an attachment writ against D. G. Owens upon certain nursery

stock of appellant then in the freight house of the I. C. R. R. Co., at Decatur, and the plea denied its ownership or right of possession thereof, at the time of the levy. On the trial a verdict was returned for the defendant, and the court, after overruling a motion to set it aside, rendered judgment against the plaintiff for costs, from which it prosecutes this appeal.

Appellant shipped the stock in question at Bloomington on October 23, 1895, consigned to itself at Decatur, with a bill of lading indorsed by it "Agent, please deliver to D. G. Owens, agent, upon payment of charges," and on the 24th they were attached in the freight house of the railroad company, one of its agents being appointed custodian. Notice of appellant's claim was given and a trial had (presumably of the right of property, but of which neither the result nor any other particular was shown).

Appellant claims that Owens was merely its agent to make sales of its stock or take orders therefor, under a provision of a contract between them which was as follows: "Third. If we accept payment from deliveries, you hereby agree to turn over to us all original orders, we to conduct deliveries, to hold all stock, original orders and all proceeds of deliveries until our entire bill with seven per cent interest thereon, with all expenses of transportation, collection and return of money to us, is paid; when balance of stock, orders, etc., will be turned over to you or left with agent or agents, subject to your order and at your risk."

Only so much of the contract is copied in the abstract or argument for appellant, but the record shows it is preceded by the following:

"BLOOMINGTON, ILLINOIS, July 2, 1895.

D. G. Owens, Decatur, Illinois.

DEAR SIR: We submit the following terms to dealers desiring to purchase their stock of the Bloomington Phoenix Nursery. To those signing this contract we will furnish a certificate showing that they have agreed to purchase their stock of us to be sold in the territory specified in the certificate. Terms of payment: First, net cash at nursery with

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order. Any deviation from this rule must be agreed upon early in the season. Second, bankable note on thirty days' time. Third, as is above set forth."

It further provides that the company "will heel the stock in trenches at the nursery packing ground, when the contractor must satisfy himself as to the count before assorting retail orders;" that twine, rope, burlap, extra moss, straw, etc., will be furnished at reasonable rates; that \$2.50 will be charged for full sized boxes, including moss, straw, etc., used in packing the same; that packages will be "delivered here at the depot free;" that "in case the contractor's net wholesale bill is less than \$100, ten per cent will be added to the within prices;" that "this contract is to cover only the retail sales of contractors," and that the company reserves the right to stop the sale of stock at any time should the demand exceed its supply. After some further suggestions, not pertinent to the question here, the company say in conclusion: "We desire to sell stock to none but thorough, trustworthy men, who will take hold of the business with a will, conduct it fairly and honorably, and pursue it to the end," and asked him, if disposed to enter heartily into the work and the terms thus proposed suited him, to signify his acceptance by signing the blank below. He did so and got his certificate. To the contract was appended a list of the company's stock, with "net cash prices."

It was for the court to determine, as a question of law, what relation between the parties, with reference to the property mentioned, was established, upon a construction of the instrument fairly considering all of its provisions. *Chickering et al. v. Bastress et al.*, 130 Ill. 214. This familiar general rule of construction was expressly applied in a case like this, where the court recognized the force of one view from a particular provision, but adopted the other from a consideration of the whole. *Lens v. Harrison*, 148 Id. 604. Here, what precedes the particular provision relied on by appellant seems clearly to indicate that the relation contemplated was that of vendor and vendee. The proposition submitted, with list of stock and prices, was not a

general advertisement nor intended for consumers desiring to use the stock in the improvement of their premises, but to "dealers" desiring to "purchase" stock to be "sold" in a certain territory. Two distinct and absolute sales—one by the company to the dealer, and the other by the dealer to the consumer—thus appear to be contemplated. There is no necessary inconsistency between this inference and the particular provision "third." Like the first and second, it is under the heading or general statement of the "terms of payment." The first two seem to relate to payments directly by Owens—on or before delivery to him "at the depot" in Bloomington—either by cash or bankable note. Such payment and delivery would certainly consummate a sale to him, and leave no possible room for the idea of agency or of any relation between the company and the consumer. The third relates to cases in which payment is made, not by him directly, but by his vendees, for him, on delivery at Decatur, in good condition and at the time fixed therefor by the order, as appears from the sample order in evidence. By that provision, if the company sees fit to accept such payment, which does not appear to be obligatory in any case, it would have the right to "conduct" the deliveries (which would certainly include the right to make them by any agent or agents it should appoint for that purpose), and hold all the orders and stock until its entire bill against Owens, with the interest and expenses mentioned, should be paid, and the balance of stock, orders, etc., if any, it was to account for and turn over to him—not as the company's agent, but as the absolute and rightful owner, whose entire debt for it had been paid. Thus this provision was merely security to the company for the price of goods sold to him, with interest and extra charges. It might well require such security, in view of his financial condition. He seems to have been unable to comply with the alternative terms of payment, and the company made advances, not as compensation for his services as agent in canvassing, but for him to live on while canvassing, and which he was to repay. As the court said of a clause of the contract in

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the case of Chickering v. Bastress, reserving to the vendors the right to transfer, remove, sell or repossess themselves of the pianos in question, at any time, without notice; so we say of this provision, that "we regard it as in the nature of the insecurity clause usually inserted in chattel mortgages;" and as in that case the vendors might have lawfully availed themselves of it, and held the property against the execution creditors of the vendee, if they had actually repossessed themselves of it before the levy, so here, the nursery company might have lawfully enforced this provision as against the attaching creditor of Owens, notwithstanding an actual sale to him, if it had retained the possession of the nursery stock in question—as it could have done by "conducting" the delivery through some other person as its agent for that purpose. But it did not, in all cases, if in any, so avail itself of this right. In this case Mr. Rosney, the president of the company, testified: "On the day we shipped the goods I asked Owens if he would act as our agent to deliver them at Decatur, and he said he would"—a question altogether inconsistent with any understanding on his part that Owens was already their agent in respect to them.

The contract nowhere characterizes him as the agent, factor or salesman of appellant, but as dealer, purchaser and contractor. It makes no provision for his compensation as agent. It charges him absolutely with prices and extra expenses, and leaves him to obtain remuneration by selling at prices in excess of the aggregate of these, but without limitation as to such excess. The goods were perishable and not to be returned in specie, and at his own risk of loss he was debtor for the price and extras charged.

We therefore hold that he was a purchaser, subject to this provision only in case he failed to make payment by net cash with the order or bankable note at thirty days, and that the company waived the security of this provision when it divested itself of possession. This we think it did, as between the company and him, by transferring the bill of lading indorsed to him. It was not like a shipment C.

O. D., nor did Owens obtain it by any fraud or misrepresentation. The company dealt with him under the contract, which made him chargeable, like a purchaser, with the freight from Bloomington. If he had been a mere agent to receive the company's goods and deliver them to its customers for it, he would hardly have been charged with freight without provision for its repayment, together with compensation for his services. The order for delivery to him upon payment of charges, did not make such payment a condition precedent as between the nursery company and Owens, nor as between him and the railroad company. It was in legal effect an actual delivery by appellant, and the question of payment of charges was one wholly between him and the railroad company. The latter could lawfully deliver to him without a precedent payment of the charges.

We perceive no reason or motive for designating him as "agent" in the indorsement, except to keep off his creditors—to cover up a sale and preserve a lien in the nursery company for the price of the stock.

In the abstract appears what is there called a "sample copy" of order taken by Owens as salesman of appellant, which, after the number and date, reads, "I have this day bought of Phoenix Nursery Company the following bill of nursery stock," etc., and after giving the list and prices, proceeds, "For which I promise to pay Phoenix Nursery Company, or bearer," the total amount stated. But the record shows what appears to be the printed form furnished by the company, in which there are blanks for the name of vendor and promisee, and the words "Phoenix Nursery Company" are written. The form of orders is not prescribed nor indicated by the contract, and the form used can not change the effect of the contract. Owens could as well have filled the blanks with his own name. The contract fully provided for the rights of the company by requiring net cash, or bankable note, or collection by it on its own delivery; and this form rather than that may have been dictated to Owens by some idea of convenience or a purpose to hinder his creditors.

There is no dispute as to what we consider the decisive facts. They appear in writing, and the questions are as to their legal effect, which are questions for the court. We hold that by the contract the goods levied on were sold by appellant to Owens, and by the indorsement of the bill of lading delivered to him; and therefore deem it unnecessary to discuss the instructions. In our view of the law, no other verdict than the one rendered could have been sustained. The judgment will therefore be affirmed.

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Chicago & Alton Railroad Company v. Margaret Hause, Adm'x.

1. **FELLOW-SERVANTS—Burden of Proof as to the Existence of the Relation.**—In an action against a railroad company for damages caused by the negligence of an employe, the burden is on the defendant to show that the plaintiff and the negligent employe were fellow-servants, although the declaration contained a negative allegation.

2. **MASTER AND SERVANT—Risks Assumed by Servant.**—An employe does not assume all the risks incident to his employment, but only such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them; or if extraordinary, such as are so obvious and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment.

3. **SAME—Liability of Master for Injuries to Servant.**—A master is responsible for injuries to one of his servants, caused by the negligence of another, where the servant causing the injury is not a fellow-servant of the one injured.

4. **SAME—Liability of Master for Injury Caused in Part by the Negligence of a Fellow-servant.**—Although the negligence of a fellow-servant may have contributed to cause an injury, if the person injured exercised due care, and his injury was caused by such negligence, and the contributing negligence of the master, or of another servant not a fellow-servant, the master will be liable.

5. **RAILROADS—Failure to Provide Switch Lights as Negligence.**—A light so attached to a switch that an engineer in charge of a train can see whether it is open, in time to stop the train, if necessary to avoid injury, is a reasonable provision against danger, and a jury may well find that a failure to provide such a light is negligence.

6. **NEGLIGENCE**—*Failure of an Employe to Suspect that Other Employes Have Omitted a Plain Duty is Not.*—The fireman of a locomotive was killed in consequence of a switch being left open which should have been closed. *Held*, that under the evidence, the crew of the locomotive had no reason to suppose that the switch was open and were not bound to suspect that a duty so plain and simple, and yet so important, had been neglected, and that a finding by a jury, that in risking a possibility so bare and remote, the deceased was not guilty of negligence, ought not to be disturbed.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of McLean County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

WM. BROWN and J. E. POLLOCK, attorneys for appellant.

F. Y. HAMILTON and KERBICK, SPENCER & BRACKEN, attorneys for appellee.

When an injury is the result of concurrent negligence of the master and a fellow-servant, the injured servant, if observing ordinary care for his own safety, may recover of the master. *Flike v. Boston, etc., R. R. Co.*, 53 N. Y. 549; *Booth v. Boston, etc., R. R. Co.*, 73 N. Y. 38; *Stetler v. C. & N. W. R. R. Co.*, 46 Wis. 497; *Paulmier, Adm'r, v. Erie R. R. Co.*, 5 Vroom (N. J.) 151; *Franklin, Adm'r, v. Winona & St. P. R. R. Co.*, 37 Minn. 409; *Elmer v. Locke*, 135 Mass. 575; *Grand Trunk R. R. Co., v. Cummings*, 106 U. S. 700; *Whittaker v. Delaware & H. C. Co.*, 126 N. Y. 545, *Coppins v. N. Y. Cent. R. R. Co.*, 122 N. Y. 557; *Rogers v. Leyden*, 127 Ind. 50; *Penn. etc., Co. v. McCaffrey, Adm'r (Ind.)*, 29 L. R. A. 104; *McMahon v. Henning*, 1 McCrary, 516; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Monmouth M. & M. Co. v. Erling*, 45 Ill. App. 411; *Cooley on Torts*, 570; *Deweese v. Meramec Iron M. Co. (Mo. Sup.)*, 31 S. W. 110; *International & G. N. R. R. Co. v. Sipole (Tex. Civ. App.)*, 29 S. W. 686; *Island Coal Co. v. Risher (Ind. App.)*, 40 N. E. 158; *Norfolk & W. R. R. Co. v. Nuckols, Adm'r (Va.)*, 21 S. E. 342; *Browning v. Wabash Western Ry. Co. (Mo. Sup.)*, 27 S. W. 644, S. C. 124, Mo. 55.

Where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the master is liable for the resulting accident. Wood on Law of Master and Servant, Sec. 358; Patterson v. Pittsburgh, etc., R. R. Co., 76 Penn. St. 389.

It is only where the instrumentality is so obviously and immediately dangerous that a man of common prudence would refuse to use it that the master can not be held liable for the resulting damage. Wood on Master and Servant, *supra*.

The danger must be imminent and such that none but a reckless man would incur in order that the servant's continued use of the dangerous instrumentality after knowledge of its character will relieve the master from liability. Kroy v. Chicago, etc., R. R. Co., 32 Iowa, 357; Wood on Master and Servant, *supra*.

The servant's knowledge of a failure on the part of the master to furnish a suitable signal or warning of danger which may arise from the improper or negligent use by another of an appliance which if properly used is entirely safe, and the improper or negligent use of which can only be known to the injured servant through the medium of such signal or warning, will not relieve the master from liability for an injury resulting to the servant through the failure of the master to furnish such signal or warning. Chicago & A. R. R. Co. v. Matthews, 48 Ill. App. 366; Chicago & N. W. Ry. Co. v. Taylor. 69 Ill. 461.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT:

A way freight train of appellant, about one o'clock in the morning of November 2, 1894, on its way from Bloomington to Chicago, stopped at the incorporated village of Gardiner, in Grundy county, to do some switching. The road there has two tracks—the east one being for all trains going

south, and the west for all going north; and about six hundred feet north of the depot there is a switch leading off on a side track, which had been opened by a brakeman of the freight train, and through haste or oversight left open when the train passed on. It proceeded as far as the Big Four crossing, between a quarter and a half mile north of that depot, where it stopped for the passage of the midnight passenger train going south, which ran in on this open switch and by collision with some cars standing thereon, two or three hundred feet from its point, William House, the fireman on that train, was killed. It was running at a rate of twenty-five or thirty miles an hour, and that was its usual rate there, notwithstanding an ordinance of the village forbidding a speed through it exceeding ten. A light formerly kept on this switch had been taken off about sixteen months previous to the accident, and the crews of both trains, who had been running on that end of the road for several years, had long known of its removal.

To recover damages for the death of House, so caused, this action on the case was brought by his widow and administratrix. The declaration charged the company with negligence in taking off the light, and also in employing inexperienced and incompetent servants on the freight train, and the plea was the general issue. A verdict was returned for the plaintiff for \$5,000; motions for a new trial and in arrest were overruled and judgment rendered on the verdict; from which judgment this appeal is prosecuted.

The case presents three causes alike claimed to have been efficiently contributing to produce the unfortunate result, and so essentially that if either had been wanting it would not have been produced. These are, the absence of the switch light, the failure to close the opened switch, and the rate of speed at which the passenger train was running. Each of these is, by one or the other of the parties, charged to negligence—the first, by plaintiff, to that of the defendant; the second, by each to that of the freight train crew, and the third, by defendant, to that of the engineer of the passenger train.

The effect of these charges upon the question of liability here involved depends upon the relations of the parties respectively charged to the deceased, and of these only that of the freight train crew is disputed. Defendant was deceased's master and the engineer his fellow-servant, but whether the freight train crew were or were not his fellow servants is the question in dispute; and upon that question appellant is the affirmant, though the declaration contained the negative allegation.

If this question is rightly determined against the appellant, the judgment must be affirmed, because it is conceded that leaving the switch open was negligence and was a proximate and efficient contributing cause of the accident, and that the freight train crew were servants of the defendant; and the law clearly is that the risk of injury by their negligence, if they were not his fellow-servants, was not assumed by the deceased, but is chargeable to appellant, their master. If this question is decided against the plaintiff, another would remain to be considered.

In the instructions given for the plaintiff defining fellow-servants the decisions of the Supreme Court were substantially followed, while in those given for the defendant the definition was more favorable than it was entitled to. *Chicago & A. R. R. Co. v. O'Brien*, 155 Ill. 630.

We think the evidence sufficiently supported the finding that the crews of these two trains were not fellow-servants—not so co-operating nor habitually associated as to make them such. Besides the case just cited, and those therein referred to, we cite only *Lake Erie & W. R. R. Co. v. Middleton*, 142 Ill. 550, as illustrating the rule held.

Again, the master should take reasonable care to prevent injury to his servants by accident while properly doing their work as such. The train of the deceased was a midnight and fast passenger that made no stop at Gardner and had nothing to do with the switch there, but was exposed to danger from its misplacement. That risk could be avoided or greatly lessened by the cheap and simple means of a light so attached to it that the engineer in approaching could see

whether it was open in time to stop or slow as might be necessary before reaching it. The company could easily provide it, but the train crew could not. That it was a reasonable provision against that danger to crew and passengers, however remote, is manifest. The jury might therefore well find that under the circumstances shown, including the fact that it had been provided and previously long used for that purpose by the company, its removal was an act of negligence, which directly and materially contributed to the injury here complained of. If it had not been removed or had been restored in all probability that injury would not have been done. That appellant was in fault with respect to the absence of the light is not denied, but it is contended that the risk it created was accepted and assumed by the deceased.

An employe does not assume all the risks incident to his employment, but only such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them; or if extraordinary, such as are so obvious and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment. The principle is that he can not recover for an injury due to his own negligence or carelessness though that of the master may have also directly and materially contributed to cause it; and his taking or retaining the employment, with such knowledge, is proof of such carelessness on his part. Wood on Master and Servant, Secs. 384-5 and notes.

In this case the risk was that the switch might be open and the engineer unable to see it in time to avoid injury. This may be said to have been incident to the employment and apparent to the deceased; but whether usual or extraordinary and whether it exposed him to danger so imminent as to charge him with a want of ordinary care for his own safety in continuing in the service were questions for the jury.

"Usual" is defined as "common, frequent, ordinary,

customary, general;" and "ordinary" as "common, usual, often recurring." (Webster.)

It can not be truly said that a switch left open when it should have been closed is an ordinary or usual incident in the employment of train hands on a railroad, and it is certain that no degree of light would enable the engineer to see it open except when it is open.

Here there was no defect in the switch itself. Had it been used at all after it was opened it would have prevented the accident. The duty to close it rested upon those who knew how, were well able, had full opportunity and every motive of interest to perform that duty and a settled habit of performing it. Used by this freight train daily for several years, it does not appear that it had ever before been left open. The two trains usually passed somewhere between Pontiac and Mazonia, and Gardner is between those points. The passenger crew saw the freight train on the night of the accident a short distance north of Gardner and knew it had come through Gardner only a short time before. They had no reason to suppose that it had left the switch there open, and were not bound to suspect that the freight crew had neglected a duty so plain and simple and yet so important. If the jury found that in risking a possibility so bare and remote there was not such carelessness on the part of the deceased as should bar a recovery, we ought not, on this evidence, to overrule that finding. *Lake Shore & M. S. R. R. Co. v. Parker*, Ex. 131 Ill. 557. No other negligence is imputed to him, and if in taking that risk he showed himself reckless, it would appear by the same token that for sixteen months before the accident, the company had, upon its midnight special, limited, not one train hand who was reasonably or ordinarily careful for his own safety, to say nothing of that of its passengers.

It is unnecessary to consider the question of negligence of the engineer in running at such a rate of speed, for though he was a fellow-servant of the deceased and however negligent, if the deceased himself exercised due care,

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and his death was due to the contributing fault of either the company or the freight train crew, and *a fortiori* to that of both so contributing, the plaintiff was entitled to recover.

The verdict appears to be well supported, and perceiving no material error in the record, the judgment will be affirmed.

**Rudolph Hutmacher, for use of Cora Brinton, Adm'x,
et al., v. The Anheuser-Busch Brewing
Association et al.**

1. **FRAUD**—*When Presumed in an Assignment*.—While a provision in an assignment by an insolvent for the benefit of creditors, for the payment of a debt for which the assignor is not liable, raises a presumption of fraud, it is not conclusive, but will be rebutted by proof that the supposed debt had in fact no existence.

2. **SAME**—*In Assignments for Benefit of Particular Creditors*.—If it be the law that fraud in fact may be inferred where an insolvent debtor makes an assignment for the benefit of particular creditors, of property of greater value than the parties could have reasonably supposed was sufficient to satisfy the claims, although it turns out that there is no surplus in fact, it must appear that there was not only a reasonable probability but also an actual contemplation and expectation of a surplus.

3. **STATUTE OF FRAUDS**—*Intention Without Injury*.—A naked intent, which does not and can not defraud, is not within the statute.

4. **TRUSTEES**—*May Incur Expense in Execution of Trust*.—It is not only the right but the duty of a trustee to incur whatever reasonable expense is necessary to defend or execute a trust whether expressly authorized by the deed creating it or not; such expense is properly chargeable upon the trust fund; and under this rule the payment of attorneys' fees to any attorney, other than the trustee himself, who renders services is proper.

5. **JUDGMENTS**—*Nominal Plaintiff Can Not Receive Satisfaction of*.—The nominal plaintiff in a suit brought for the use of another can not receive satisfaction of the judgment, although the legal interest is in his name, and a payment to him is not a satisfaction of the debt.

6. **GARNISHMENT**—*When it May be Maintained*.—After a judgment is obtained in the name of one person for the use of another the judgment debtor can not be garnished by creditors of the nominal plaintiff.

7. **SAME**—*Creditor has no Greater Right than His Debtor*.—In gar-

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nishment proceedings the garnisheeing creditor has no greater right to recover of the person garnisheed than the execution debtor in whose name the suit is brought, and can not recover if he could not.

Garnishment.—Error to the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

GEORGE W. FOGG, attorney for plaintiffs in error.

GOVBET & PAPE, attorneys for defendants in error.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On the 11th of March, 1887, Hutmacher executed to Vandeenboom an assignment, of which the following is a copy :

“In consideration of \$1 to me in hand paid, the receipt of which is hereby acknowledged I hereby sell, assign and set over to Joseph H. Vandeenboom a certain claim and account against The Anheuser-Busch Brewing Association of St. Louis, Missouri, amounting to \$2,092.60 and upward, owing to me by said association, and for the further consideration that when said account or any part of the same against said association is collected, it is to be applied as follows: 1. In payment of all costs and expenses of collection of said claim and account, including reasonable attorney fees; 2. It is to be applied to the payment of the claims and accounts of Moeller & Vandeenboom against me, or my wife, or against both or each of us; and in the payment of a certain judgment of William H. Govert against me in the Adams County Court, for the sum of \$273.14 and interest and costs, and two certain promissory notes of mine to Theodore Herr, amounting in the aggregate to \$471.90, besides interest thereon; provided, if there be not sufficient amount collected from the said association on said claim and account, after payment of all costs and expenses and attorney's fees, the said amount so collected, after such payment of costs, expenses and attorney's fees is to be applied pro rata in payment of said demands of said Moeller &

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Vandenboom, Govert and Herr, pro rata, according to their respective demands. Said Vandenboom is not to pay any attorney fees except out of proceeds of collection as aforesaid. Dated this 11th day of March, A. D. 1887. R. Hutmacher. (Seal)."

The claim referred to, which was for a balance on an unsettled account for building an ice house, filling it with ice, moneys paid out for it and services rendered while acting as superintendent of the work, had been standing for several years, wholly disputed by the brewing association on the ground that every dollar it ever owed him had been fully paid. The creditors named were pressing him for payment. Excepting this claim, he had no means of making it, and was unable to prosecute that, but was willing to apply it as he did. After considering the situation they concluded to take the chances, and upon the execution of the assignment, an action was brought against the association in the name of Hutmacher for the use of Vandenboom, in which, after two obstinately contested jury trials—one upon an issue of fact on a plea in abatement and the other on the merits—on the 21st of December, 1887, judgment was given for the plaintiff for \$1,640. That judgment, on successive appeals by the defendant, was affirmed by the Appellate Court (29 Ill. App. 316) and by the Supreme Court in an opinion filed April 5, 1889 (127 Ill. 652); and on June 7, 1889, was paid in full to the attorneys of Vandenboom.

It appears that on February 3 and November 22, 1886, and March 26, 1888, judgments were rendered against Hutmacher in favor of William P. Brinton, John H. Fitzgerald, and Charles H. Chase, respectively, for sums amounting in all to \$1,575.31, on which executions were issued and returned no property found, and which are still wholly unsatisfied. These judgment creditors are all deceased, and their personal representatives, by the garnishee proceedings herein against the Brewing Association, seek to obtain satisfaction out of its indebtedness to their common debtor.

In two cases the summons was served on the garnishee about a month before it paid the judgment to Vandendoom, but after the opinion of the Supreme Court affirming it was filed, and the other on the day of that payment, but whether before or after its actual payment does not appear. Like interrogatories were filed in each and like issues made thereon. The garnishee's answer in the broadest terms denied that when the summons was served, or at any time since, it had in its possession or under its control any lands, chattels or effects of Hutmacher, or was in any manner indebted to him in any amount whatever, disclosed the facts of his claim and its assignment to Vandendoom, which was set out in *haec verba*, and averred that it had notice thereof when the suit was brought on said claim by the fact that it was brought in the name of Hutmacher for the use of Vandendoom, and that judgment had been recovered therein and paid in full as above stated. To which plaintiffs replied that the garnishee by its answer had not truly discovered, etc., and averred that the alleged assignment was made by Hutmacher with intent to defraud, hinder, delay and disturb the garnishors and others, creditors of him the said Hutmacher, and was and is utterly void—concluding with a verification.

The three cases were consolidated, and their trial together resulted, December 6, 1890, in a verdict for the defendant. Motions by plaintiffs for judgment, notwithstanding the verdict, and for a new trial, were overruled and judgment rendered for defendant for its costs. An appeal was prayed but never perfected, and the record is here on a writ of error sued out only a little before the expiration of the five years allowed therefor.

Many errors are alleged, but all that are of any importance in our estimation are based and depend entirely upon the contention that the assignment to Vandendoom was upon its face fraudulent in law.

There is no claim that the debts provided for, or intended to be, were not *bona fide* due to the creditors respectively named, nor any proof, unless it is in the instrument itself, that either of them had notice of any other owing by Hut-

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macher, until these garnishee proceedings were commenced or in any way actually participated in any fraudulent intent, if any there was, on his part. He testified that there was none, and Vandenboom that there was none on his, and that he did not know of any on that of Hutmacher, or of any other debts he owed.

But it is said there are three provisions in the instrument which make it fraudulent in law: first, for the payment of the debt of his wife; second, of attorney's fees for the collection of the claim; and third, it attempted to assign, and in terms assigned, a claim three times as large as the aggregate amount of the debts it was to pay, which was in legal effect, as to the surplus, an assignment for the use and benefit of the assignor.

From the evidence it clearly appears that Moeller & Vandenboom were dealers in lumber, who had made sales of several parcels to Hutmacher, but when the assignment was prepared and executed at the office of counsel in the absence of their books, the amount due and other particulars were not precisely known, but it was found on their examination to be \$125.53. It was also then supposed that some of it might have been used to repair some building on land of Mrs. Hutmacher; but it was all charged to her husband, and it does not appear that she ever ordered any or that any was so used. The inference is that it was not.

While a provision in an assignment by an insolvent for the benefit of creditors, for the payment of a debt for which the assignor is not liable, raises a presumption of fraud, there seems to be satisfactory authority for holding that it is not conclusive, but will be rebutted by proof that the supposed debt had, in fact, no existence. *Boos v. Merriam*, 29 N. W. Rep. 832; *Crook v. Rindskopf*, 105 N. Y. 476; *Turner v. Jaycox*, 40 Id. 470. If there was no such "claim or account" against the wife, the provision could not defraud any other creditor by any operation in law or fact, and a naked intent, which does not and can not defraud, is not within the statute.

We understand it to be not only the right but the duty

of a trustee to incur whatever reasonable expense is necessary to defend or execute the trust, whether expressly authorized by the deed creating it or not, and such expense is properly chargeable upon the trust fund. This includes attorney's fees to any, other than himself, who renders the services. A citation of authority on this point can hardly be necessary, but from the many in the brief, we take Burrill on Assignments (5th Ed.), Sec. 417; Bump on Fraudulent Conveyances (3d Ed.), 423-5; Hill v. Agnew, 12 Fed. Rep. 233. In this case the necessity for such services, costs and expenses was fully anticipated by the assignor and assignee. The Brewing Association absolutely refused to pay anything on account of the claim. Without the suit nothing would ever have been realized on it. The fees, costs and expenses charged were shown to be reasonable. They did not lessen any means of Hutmacher that would otherwise have been available to any creditor. In his hands the entire claim, however just, would have soon become barred by the statute of limitations, because he was unable to furnish security for the costs of prosecuting it.

The claim assigned was stated in the assignment "as amounting to \$2,092.60 and upwards." In the declaration the *ad damnum*, which is usually much larger than is really claimed, was \$2,500, and the items of the account filed with it footed up at \$2,570, while the debts provided for amounted, exclusive of interest, to only \$870.57; and the fraud alleged is in the reservation to the use and benefit of the assignor of this large excess of the amount of the claim over the amount of the debts to be paid out of it.

What was assigned, however, was not any certain sum of money, but only a claim, which was wholly unsecured, unliquidated, and disputed, and therefore only its net value to be ascertained and fixed by the judgment which should be recovered, and the reasonable fees, costs and expenses required for such recovery, which should be deducted. This was so ascertained to be less than the sum of the debts provided for. There was no excess or surplus, but on the contrary, a deficiency—the fees and expenses being about \$800.

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If it be the law, as some authorities seem to hold, that where an insolvent debtor makes an assignment for the benefit of particular creditors of property of greater value than the parties could have reasonably supposed was sufficient to satisfy the claim, fraud in fact may be inferred from that circumstance alone, although it turns out that there is no surplus; we apprehend there must be not only a reasonable probability but also an actual contemplation and expectation of a surplus. Here the evidence shows there was no such expectation. The assignee doubted whether he could recover anything, and nobody looked for anything near the amount of the judgment. The claim, included interest on an unliquidated account and other items which they reasonably could not and in fact did not expect to recover, and the assignment itself, recognized the possibility, if not the probability, of a deficiency, by the provision for payment of the debts *pro rata*.

These points have been noticed but briefly in comparison with the elaborate argument made and the array of authorities cited as in their support, not only because we think them untenable, but also that for other reasons, not considered in that argument, this proceeding can not be maintained.

Notwithstanding the statute forbidding preferences in a general assignment for the benefit of creditors, a failing debtor may otherwise prefer and pay particular debts, as by transferring or applying property in good faith for that purpose directly to the creditors so preferred respectively. The assignment here in question is clearly not a general assignment under the statute. If it were, the trust should be administered under the direction of the County Court, and neither the assignor nor the assignee would be liable to garnishment at the suit of an omitted creditor. It was an application of specific property, in payment of specified debts. No doubt is thrown by the evidence upon the actual good faith of the parties to, or interested in the transaction. But the creditors were several, while the property assigned was in its nature such as could not be served or

apportioned to them respectively by the debtor directly. That condition should not deprive him of a right common to debtors generally, to pay with such means as they have that are acceptable to their creditors. The natural and proper way to make it available for the purpose in this case was to assign it to some one of them, to convert into money and apportion the proceeds.

In *Beach v. Bestor*, 47 Ill. 521, it was held that a transfer by an insolvent debtor of a chose in action to pay out of its proceeds several debts, is in general to be distinguished from an assignment or conveyance for that purpose of things in possession, with reference to the effect of a reservation or provision for the return of the surplus to the assignor, and that such a reservation or provision in such case does not make the assignment fraudulent as to other creditors.

Again, this proceeding is in the name of Hutmacher for the use of certain judgment creditors, to recover the amount of an alleged indebtedness to him of the Brewing Association. When the writs of summons herein were served upon it, that indebtedness was not due or owing to Hutmacher. Nearly two years before such service it had not only been assigned by him, with notice thereof to the association, but become merged in a judgment in favor of Vandendoom, his assignee. After all the means in its power had been used to prevent the recovery and afterward to reverse the judgment, it was affirmed by the court of last resort, and thereupon paid in full to the party appearing of record to be entitled to it. In making such payment it took no risk, but that of its ability to justify it; and that ability is conclusively shown by the record in this case. It was bound to make it to Vandendoom, and had no right, legal or equitable, to refuse it. *Atkins v. Moore*, 82 Ill. 240; *Knight v. Grifey*, 161 Id. 85. Payment to Hutmacher himself, its legal creditor, would not have satisfied the judgment. Vandendoom could then have brought suit upon it in the name of Hutmacher, for his use, as he did upon the claim. *Triplett v. Scott*, 12 Ill. 137. That form of the action was record

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notice to the defendant of the right of the assignee, the real plaintiff, which courts of law will protect. After such notice the defendant can not be garnisheed for a debt due to the nominal plaintiff. *Hobson v. McConnel*, *ibid.* 170. The reason is that the proceeding must be in the name of the assignor, and the garnishor standing in his shoes and in no better condition, therefore can not recover if he could not. *Richardson v. Lester*, 83 Ill. 55. And that he could not, against his own assignment to Vandenboom, admits of no doubt. The judgment below will be affirmed.

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Springfield Consolidated Railway Co v. Libby Hoeffner.

1. CORPORATIONS—*Degree of Accuracy Required in Use of Corporate Name.*—Where the name of a corporation consists of several words, the omission of some of them, in proof identifying a defendant, is not important if it is evident who is intended.

2. EVIDENCE—*Of Facts Proved by Other Evidence, as Error.*—In a suit for personal injuries, the plaintiff's affirmative answer to an inquiry as to whether she was hurt or not, made at the time of the injury, was admitted. The fact that she was hurt was abundantly proved by other evidence. *Held*, that the admission of such evidence furnished no ground for complaint.

3. INSTRUCTIONS—*Summarizing the Case.*—An instruction summarizing a case, and telling the jury that if, from a consideration of all the evidence, they find the facts as stated, plaintiff is entitled to recover, is not subject to objection as ignoring the theory of the defense, when it embraces all the elements essential to a recovery.

4. DAMAGES—*For Personal Injuries, to be Assessed in the Judgment of the Jury Under the Evidence.*—The damages in a suit for personal injuries are not susceptible of exact proof and must be left to the judgment of the jury under the evidence, and an instruction in such a case telling the jury that if they find the defendant guilty they should consider certain stated elements of damage, if proved, and assess the amount at "such sum as in their judgment will compensate," etc., is not open to the objection that the plaintiff is only entitled to recover such damages as the evidence warrants.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1896. *Affirmed.* Opinion filed June 16, 1897.

WILSON & WARREN and PALMER, SHUTT, DRENNAN & LESTER, attorneys for appellant.

E. E. BONE and ORENDORFF & PATTON, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action on the case for personal injury, brought by appellee. The trial on the general issue resulted in a verdict for \$2,441 damages. Whereupon defendant entered its motion to suspend further proceedings in the case, and for leave to file a plea of misnomer of plaintiff, and to withdraw the plea of the general issue for that purpose—which was denied, as was also its motion for a new trial—and judgment was rendered on the verdict. From that judgment this appeal was taken.

Plaintiff and her brother-in-law, John Hoeffner, were the only witnesses who claimed to know how the alleged injury was caused. According to their testimony, on the evening of September 27, 1895, they together attended a show then on exhibition at the Springfield Fair Grounds. About half past nine o'clock they there took an open trailer, following and attached to a closed car of the defendant company, used as a motor, to return. When the conductor came to take up their fare she distinctly notified him that she wished to get off at the crossing of Ninth and Reynolds streets, and requested him to stop the car there to enable her to do so; and again, when about four blocks from that crossing he asked her where it was she had said she would get off, she told him "Ninth and Reynolds." On reaching the crossing they slowed up and her brother-in-law got off on the north side of the street. As the car continued to slow she arose and prepared to alight promptly when it should stop on the south side.

She stood with one foot in the car and the other on the foot-board holding on to the brass arm of the seat as it seemed about to stop and she was about to alight, when,

without stopping, it started forward with a sudden and violent jerk, breaking her hold, throwing her off upon her back, and so causing the injuries complained of, the most serious of which appears to have been to the spine. Her brother-in-law went to her and asked if she was hurt, to which, over objection, she answered simply "yes." It was with great difficulty that she got to her home—some four blocks distant—where she immediately went to bed and sent for her family physician, who came at about eleven o'clock, and upon examination ascertained, and on the trial testified, that she was in fact seriously hurt.

Her right to recover was denied on the proposition asserted, that there was no proof that the accident occurred or the injury, if any, was done on the line of defendant's road or by the act of its servants.

On that ground, if maintained, it was of course unnecessary to offer any evidence in contradiction of plaintiff's allegations of due care on her part or negligence on that of the defendant. Some, however, was introduced, to prove an admission by her soon after the accident, that she intentionally stepped or jumped off the car on the north side of the cross street while it was in motion, and with the understanding that according to the rule and custom it would not stop until it reached the south side; but it was denied by her, and the jury appears to have given the greater credit to her statement.

Both the abstract and the record show that plaintiff testified that on the occasion in question she was a passenger "on a street car of the Consolidated Street Railway Company," and John Hoeffner, that he was a passenger "on a street car of the Springfield Consolidated Railway." She omitted the word "Springfield," which is the first, and he the word "Company," which is the last in the name of the defendant.

In the statement of facts contained in the argument for appellant, it is said, after giving the name in full, that she testified that she and her brother-in-law boarded an open trailer of the "street railway," and that he "testified the

same as plaintiff as to the boarding of the car;" and no other fact or reason is stated for the claim that there was no proof that the accident, if any, occurred on defendant's line. The witnesses named testified alike that they were together on the same car; that it was a street car, and on the line that crossed Reynolds by Ninth street. That appellant's cars, on the night of September 27, 1895, were running with open trailers on that line, was fully proved and conceded. These facts, with the name as stated, were sufficient, notwithstanding the omissions in the latter, to identify the defendant. *Board of Education v. Greenebaum*, 39 Ill. 614; *Chadsey v. McCreery*, 27 Id. 253; *O'Connell v. Lamb*, 63 Ill. App. 652. In view of this evidence the court properly refused to instruct the jury absolutely to find for the defendant.

It is said that defendant produced all of the conductors who served open trailer cars upon the Fair Ground line on the night in question, and that neither the plaintiff nor her brother-in-law was able to recognize among them the one who served on their car at the time of the alleged accident; and that each of those conductors testified that no such accident occurred on the car he served, so far as he knew. Their proper place on the car was generally the rear platform, and they occupied it except when duty, in collecting fares and assisting at the brake, called them forward; and there were two arc lights at the crossing.

Before these conductors were introduced, plaintiff and Hoeffner had stated that they could not give any particular description of the one on their car, nor be able to recognize him, because they had no occasion to notice and did not notice him particularly at the time. More than four months had elapsed since they saw him. Hoeffner was not then a resident of the city. They merely observed, according to their recollection, that he was rather a short man and wore a conductor's uniform. When lined up in court we may presume that they were bareheaded and in common but various styles of clothing. The inability of the witnesses under the circumstances to pick him out of a

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dozen or more, if he was among them, would hardly tend to discredit their testimony as to the principal facts, in respect to which their senses could not have been deceived nor their memory at fault.

The evidence, however, does not make it clear that he was among them, but rather that one or more of those on the service that night were not produced. If he was present and testified that no such accident occurred on his car to his knowledge, the jury might well have believed from the evidence that it nevertheless did occur, and substantially as charged, though without his knowledge. For if, as the uncontradicted evidence is, the car was slowing from the north to the south side of Reynolds street, as it would if a lady passenger was to get off there, and when at its slowest, a few feet south of the south sidewalk, it suddenly started with a violent jerk, the inference from the testimony of the conductors would be that during all that time he was on the forward platform operating the brake that slowed it, and that the start and jerk instantly followed his letting it off; so that at the moment of such an accident at the middle or back part of the car caused by that jerk, he was where he naturally would not have seen it, and so occupied that he probably could not. From that moment he was carried with increased and increasing speed away from the scene of its occurrence. It further appears without contradiction that Hoeffner, on getting out on the north side of the street, followed the slowing car, and though not more than ten feet from the plaintiff when she was thrown out, she was standing up when he got to her. Had the conductor returning to his place seen and recognized her as the lady who was to get off at Ninth and Reynolds, he would have supposed she had gotten off safely and so given no further thought to the matter.

Nobody contradicted the evidence that she went to the Springfield Fair Grounds, on the evening in question, a healthy, strong and active woman, about thirty-six years of age. The distance was too far to walk. Residing on East Reynolds street, about four blocks from Ninth, appellant's

line of street cars was the one most convenient for her purpose. On her return she arrived at the Reynolds crossing about ten o'clock. When she left it there she was still sound and well. In leaving it she fell upon her back, and though able to get upon her feet almost instantly, appeared unable even with assistance to walk the short distance to her home. Hoeffner said he had almost literally to drag her, and it was with great difficulty that he got her home. There she immediately went to bed. Her physician, having been called by telephone, came at about eleven o'clock. He found her in bed complaining of pain in her hand, stomach and back, with tingling or numbness in the extremities, and apparently suffering so intensely that he administered morphine twice by hypodermic injection, and remained with her three hours. In the forenoon of the following day he called again and found her still in bed and suffering from pain, though not so much, being under the influence of opiates. She complained of her back and had told him of her fall, to which she attributed the pain there. Upon examination he found two black and blue spots on the lower part, a little to the left of the spinal column. He saw her at her house afterward on October 3d, 10th, 31st, and November 4th—six visits—and from time to time at his office thereafter until January 18, 1896, when he made his last prescription for her.

Under his treatment there was some improvement as to the pain, generally, though at times it recurred with much severity, and if there was any in the condition of the spinal chord, it was slight and very slow. She was bed-fast for about ten days, and thereafter up and down, according to the degree of her pain in moving about or sitting up. On January 18th, because the irritation had not yielded to the treatment with belladonna, ergot, and some bromides, followed by tonics of quinine, iron and strychnia, he advised a fly-blister for the two points in the spine that were especially sensitive and painful, and in case they failed to help her, the use of the electric battery. He had no doubt she was suffering from spinal injury caused by the shock of her fall.

A few days before the trial, which was on January 30, 1896, she consulted another physician, Dr. Walter Ryan, of fourteen years' practice, who, upon examination by pressure and by standing her with her feet together and her eyes closed (which discovered what he called a lack of co-ordination, indicating nervous disturbance), concluded that there was spinal trouble, but as he had only her statement in addition to these tests, was unable to say positively whether it was simply irritation, which would disappear in time, or inflammation of the chord, tending to increase and to produce atrophy of the muscles and result in total disability. She showed excessive sensitiveness at several points along the column, and complained of tingling and numbness in her hands and feet.

These symptoms, so long continued, with so little abatement under active treatment, and the testimony of the plaintiff, her step-daughter and neighbors as to her condition, afford reasonable ground for apprehension that she is to be a lifelong sufferer from physical disability and severe pain.

In the evidence relating to the cause and manner of her injury, there can hardly be said to have been any conflict, and the verdict was, in our judgment, so clearly warranted by it, that any error of the court sufficient to require a reversal of the judgment must have been very extraordinary. We discover in the record none that was at all substantial.

It is said the court, after trial and verdict on the general issue, should have stayed the proceedings and allowed the defendant to withdraw that plea and interpose a plea of misnomer of plaintiff. Of course counsel knew and admit here that this would have been a novelty in practice, but insist that it would have been justified and should have been allowed under the peculiar facts in this case. Yet the affidavits filed in support of the motion disclose and allege facts which the court could see were a sufficient answer to the plea offered. Upon those affidavits, the motion would have been entitled to no favor if it had been made within

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an hour after the general issue was filed. After trial and verdict on that plea, it was not only against the rule, but absolutely without a precedent.

Again, it is said the court erred in admitting plaintiff's answer to Hoeffner's question, which was, whether she was hurt. It was asked on the spot and almost at the instant of her fall. The court said she might answer generally, limiting her to the question, and forbidding all particulars; and her answer was in one word, "yes."

It imputed no negligence to the defendant and was not "a history or part of a history of a completed past affair," but a statement of an existing fact. She was a witness on the trial and subjected to an exhaustive cross-examination as to how it occurred. That she was in fact hurt was otherwise abundantly proved, and her simple statement of it without the connections otherwise fully and properly made, being entirely useless and harmless as evidence, does not seem to be within the rule cited from *Chicago W. D. Ry. Co. v. Becker*, 128 Ill. 545, and repeated in *Ohio & M. Ry. Co. v. Cullison*, 40 Ill. App. 72.

Complaint is made of the first instruction given for plaintiff on the general ground that it summarizes the evidence on one side, omitting that of the other and wholly ignoring the theory of the defense; and was therefore such as was clearly condemned in *Pennsylvania Co. v. Stoelke, Adm'r*, 104 Ill. 205.

We think the rule as stated in that case (with somewhat less of clearness and discrimination than is desirable) does not apply here. The instruction in this case was quite lengthy and need not be copied. It does not refer to any witness or evidence particularly, but embodies conclusions "from all the evidence," which are hypothetically set forth and include every element of the case alleged in the declaration and entitling her to a recovery. Such a summary did not ignore any antagonistic theory, fact or evidence, but hypothetically and necessarily negatived them. The theory of the defense here was that plaintiff was not injured on a car or by the act of any servant of the defendant. An instruc-

tion that if the jury believed from all the evidence that plaintiff at the time of the injury was a passenger on a car of the defendant (with other facts required to make out her case as alleged), they should find the issue for her, unless they further believed from all the evidence that at that time she was not on a car of the defendant, would be an absurdity. This general objection to the form used is therefore groundless. *City of Chicago v. Schmidt, Adm'r*, 107 Ill. 186; *T. H. & I. R. R. Co. v. Eggmann*, 159 Id. 550.

Other objections of different parts or phrases of the instruction are briefly stated but not argued, and we do not regard them as of sufficient importance or plausibility to discuss.

The fourth instruction for plaintiff tells the jury that if they find the defendant guilty they should consider certain elements of damage stated, if proved, and assess the amount "in such sum as in their judgment will compensate the plaintiff for such injury, pain and suffering;" and the objection thereto is that she is only entitled to recover "such damages as the evidence warrants."

This is a case for actual and not merely nominal damages, and we think the "evidence warrants" such as are fairly compensatory, which, because not susceptible of exact proof, must be left to the judgment of the jury, upon that evidence.

Perceiving no substantial error in the record, the judgment of the Circuit Court will be affirmed.

Henry Hackemack and Raythe Nagel v. Anton Wiebrock.

1. REFORMATION—*Of Promissory Notes—Mistakes of Law.*—Where in the execution of a promissory note there is a mutual though differing mistake of the law, but a like knowledge of the facts and a like intent to have the note as it is, it will not be reformed in equity but must have its actual legal effect.

2. DECREES—*A Mistake Held to Furnish no Ground for Complaint.*—The decree in a foreclosure suit found that the defendants were per-

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sonally liable on "said note described in said mortgage," though the only note produced in evidence or claimed to be the ground of their liability was materially different from that described in the mortgage. *Held*, from a consideration of other language in the decree and the circumstances in evidence, that the phrase was inadvertently used that the note intended was the note introduced in evidence under the bill, and that the mistake furnished no ground for complaint.

Bill, to foreclose a mortgage and cross-bill to correct a note. Appeal from the Circuit Court of Hancock County; the Hon. CHARLES J. SCHOFIELD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

D. MACK & SON, attorneys for appellants.

SHARP & BERRY BROTHERS, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellee filed his bill herein against the Eagle Butter and Cheese Company and appellants, to foreclose a mortgage for \$1,500, which was executed by the company as party of the first part and after reciting the indebtedness to appellee, party of the second part, as "secured to be paid by its one certain promissory note of even date herewith for said sum of \$1,500, payable to the said party of the second part, one year after date," and describing the mortgaged premises, further sets forth that it was given in accordance with the resolution of the directors, of December 1, 1892, as follows: "Resolved, that in accordance with a resolution of the stockholders, the president and secretary of this company borrow the sum of \$1,500, on one year's time, and that they execute note and mortgage on the real estate of the company to secure the same, at a rate of interest not exceeding six per cent, and that they attach the seal of said company to said note and mortgage."

The following is a copy of the note, also filed as an exhibit with the bill:

"\$1,500.

DECEMBER 3, 1892.

One year after date we promise to pay to the order of

Anton Wierbrock fifteen hundred dollars at six per cent interest, value received.

HENRY HACKEMACK, Pres.

RAYTHE NAGEL, Sec'y."

None of the original defendants appearing, a decree was entered on default and bill taken as confessed, but afterward set aside on motion and affidavit of appellants, who thereupon filed their answer denying their individual liability for the mortgage debt, and also a cross-bill to reform the note so as to make it the note of the company. Issues being made up on the bill and cross-bill, they were referred to the master to take and report the proofs and his conclusions therefrom; and on final hearing upon the pleadings and report a decree was entered finding, among other things, that the allegations of the cross-bill were not supported, and that the complainants therein were and each of them was personally liable on the "said note described in said mortgage," and ordering that in default of payment of the mortgage debt within the time limited therefor, the premises should be sold, and for any deficiency of the proceeds to be reported by the master, execution for the amount should go against the appellants individually, and dismissing the cross-bill. From that decree the complainants in said cross-bill, Hackemack & Nagel, took this appeal.

Upon the record here the only question is one of fact on the allegations of the cross-bill that appellee agreed to lend the money to the company upon its note and mortgage security only, that all the parties intended the note in question to be and understood it was the note of the company, and that the mistake, by which it was made that of appellant's individually, was the mistake of the scrivener who drew it, which were denied by appellee's answer. Upon that issue the burden of proof was upon appellants.

The creamery and appurtenant land, which are the mortgaged premises, are situate at or near Sutter, in Hancock county. Appellee—a farmer residing in the neighborhood—is a German, who understands the English language imperfectly, and is over eighty-five years of age.

Hackemack v. Wiebrock.

While Hackemack went alone to Carthage, where the mortgaged was prepared by counsel, Nagel went to see appellee about making the loan; and it is admitted that in the interview on that occasion the old man expressed a decided unwillingness to lend the money to the company without security in addition to its mortgage, and no understanding appears to have been then reached. Upon the return of Hackemack, however, appellants and appellee went together to Tioga to have the mortgage acknowledged before I. L. Weiler, a notary public, residing there. When the instrument was produced appellee asked "where are your wives?" showing his ignorance of the character of the proposed transaction. Appellants attempted to explain that it was a mortgage of the corporation, and sufficiently executed by them as president and secretary without their wives. When he came to understand that he told them he was an old man and had no use for the creamery; that he would not lend his money upon that security alone, but that he knew them and they were good enough. They then told him that all the stockholders would be liable as well as the company in its corporate capacity; that they were stockholders of the company, and named a half dozen others who were stockholders, with some, if not all, of whom and their pecuniary responsibility he was acquainted. Seeming slow to understand their meaning as expressed in English they got the notary to explain it in German, which he says he fully did, and also thus expressed his own idea of the law as in accord with theirs. Appellee again said, in substance, that with appellants on the note, together with the company's mortgage he would be satisfied, but as we understand the testimony he did not agree or intend to accept the company's note and mortgage alone. Whatever may seem to be the conflict between particular expressions of the parties in the course of the talk, as a whole it leaves upon our minds a clear impression that while appellants intended the note to be a company note, and supposed the appellee so understood, he expected and intended it to be, and understood it was such as would bind them and each of them personally. The

mistake in the form of it as drawn was a mistake, not of fact, but of law. The notary testified that he was directed by appellants to make it accord with the mortgage, and supposed he did so by putting the abbreviations "Pres. and "Sec'y," respectively, where they appear. His understanding of the law was that these made it a note of the company. Appellants, with full knowledge of what he had done, accepted and signed it as just what they intended, but with the belief that as a note it bound only the company, though they also would be personally liable as stockholders. Appellee received it as just what he intended, but with the belief that as a note it bound both the company and the appellants. He could hardly have failed to understand from the clear and repeated statements of appellants and the notary that they supposed every stockholder would be individually liable as such for the debt of the company, whether they so signed the note or not, but he was confident that however that might be appellants would certainly be so liable on the note as signed, and with that he was satisfied. Otherwise he would not have made the loan. Thus there was a mutual though differing mistake of the law, but a like knowledge of the fact, and a like intent to have the note as it was. It must therefore have its actual legal effect.

Evidence was introduced to impeach appellee and his son by showing statements by them out of court inconsistent with their testimony, but like the master we think it of little importance, since the conclusions of fact as above stated, and found by the master and the court, seem to be sustained by that of appellants themselves and of the notary, as well as of appellee and his son.

Much is said also of the finding recited in the decree, that appellants were personally liable on "said note described in said mortgage," though the only note produced in evidence or claimed to be the ground of their liability herein, is not such as is described in the mortgage, but in law is materially different.

The bill alleged the indebtedness as of the company and the appellants, and that to evidence and secure it appellants

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made and delivered the note, a copy of which is filed therewith as an exhibit, and the company who executed the mortgage also made an exhibit. On making the order setting aside the decree first entered by default of all the defendants and letting in the appellants here to answer and file their cross-bill, they stipulated in open court that they would make no objection to the jurisdiction of the court to render a decree against them for any balance due on said mortgage and note after the application of the proceeds of the sale, provided the proof taken should show they were personally liable, and they should be permitted to offer on the hearing before the master any evidence tending to show that in equity they were not "liable to pay said note, or to reform said note on account of mistake in the form, substance or execution thereof," the meaning of which we fail to perceive unless it was that they would take no appeal from a personal decree against them for the balance mentioned.

But whatever may have been intended by it the phrase quoted was inadvertently used, and the note intended was the note set forth as an exhibit and introduced in evidence under the bill, as is manifest from other language in the decree and the circumstances shown. No other appears in the case. The master found and reported that "the note in question" is the individual note of appellants; that the mortgage was executed to "secure the payment of said note;" that "it was drafted before the note was given, but was present and considered, and also signed and acknowledged at the time the note was made." The court approved the report, and in another part of the decree, in speaking of appellants, used the language "whom the court finds are personally liable for the debt secured by the said mortgage."

The money was loaned on the security of the two instruments, and the decree gives them no more or other than their proper effect. It will therefore be affirmed.

71	176
172	575

Jehu H. Randolph v. Drew Inman.

1. **INTEREST**—*Allowance of on Settlement of Partnership Accounts.*—The general rule is that interest is not allowable on the settlement of partnership accounts, and the exception is where there has been an unreasonable delay in making settlement or improper use of the partnership funds by the partner sought to be charged.

2. **PARTNERSHIP**—*Finding as to Certain Articles on an Accounting Sustained.*—In a suit for the settlement of a partnership the original price of certain furniture and fixtures was shown, but there was no evidence of their value at the time the partnership was dissolved or the testimony taken, or that the defendant in whose possession they were left had ever used them wrongfully. Nineteen years elapsed after the articles were purchased before the master's report and final decree. *Held* that it might reasonably be inferred that the articles were of no value, or if of any, that it would be inequitable under the circumstances to charge it to the defendant.

3. **COSTS**—*In Chancery Proceedings are in the Discretion of the Chancellor.*—The apportionment of costs in a suit in equity is a matter within the discretion of the chancellor, and in this case, considering the fact that the litigation was caused by the fault of the appellant, and that he failed to a large extent as to his claim, the court is not prepared to say that the order in regard to costs was an abuse of that discretion.

Bill, to settle a partnership. Error to the Circuit Court of De Witt County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed June 16, 1897.

MOORE, WARNER & LEMON, attorneys for plaintiff in error.

GEORGE K. INGHAM, attorney for defendant in error.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The parties, with one Milmine, were copartners in a general country store, under the firm name of Milmine & Inman, at Kenney, in the county of DeWitt, from March 1, 1877, to February 28, 1878, when Milmine withdrew, and on March 1, 1878, a copartnership between Randolph & Inman was formed and continued the business until March 4, 1879, when it was dissolved.

On August 12, 1887, the plaintiff in error filed the bill herein to dissolve a partnership alleged to be then existing and to settle the matters between these parties arising out of it.

The answer denied the existence of any such partnership since March, 1879, and set up the statute of limitations as a bar to the relief asked. Complainant, by amendment to the bill, alleged that defendant had, within five years before it was filed, promised to settle up all partnership business between them done before March 4, 1879, and pay whatever balance should be found against him on such settlement. On the hearing the Circuit Court found against the complainant on that issue and dismissed the bill; but this court on November 23, 1889, reversed that decree and remanded the cause with direction "to proceed to an adjustment and settlement of the rights of the parties in reference to the partnership relations which terminated on the 4th of March, A. D. 1879." 32 Ill. App. 246.

It was thereupon referred to the master to take and report the proofs and state the account. He employed an expert to assist him in stating the account, took the proofs and made his report on October 9, 1895, and on final hearing, upon exceptions thereto, a decree was made on the next following day, finding due to the complainant a balance of \$3,112.85; but he is not satisfied with that amount and has brought the record here upon a writ of error.

It contains 546 pages, and the abstract 153. But counsel excuse us from an examination of such a mass of matter, so complicated, because the assignments of error challenge the rulings only as to two or three items, said to be sufficiently treated in their argument.

The first is the refusal to allow to complainant interest on the balance found due to him.

In *Brownell v. Steere*, 128 Ill. 209, the Supreme Court said: "The Circuit Court disallowed a charge against appellant for interest and appellee assigns such disallowance as cross-error. We do not think there has been any such delay in accounting or any such improper use of part-

nership funds as to entitle appellee to charge appellant with interest." This states the rule as it appears to be held in Illinois—that interest is not allowable on the settlement of partnership accounts, and the exception is where there has been unreasonable delay in such settlement or improper use of the partnership funds by the partner sought to be charged. *Scroggs v. Cunningham*, 81 Ill. 110; *Robbins v. Laswell*, 58 Id. 203. Nor do we understand that the Massachusetts cases cited—*Dunlap v. Watson*, 124 Mass. 305, and *Crabtree v. Randall*, 133 Id. 552—materially differ. The fact that the assets of a firm in charge of a partner to wind up its affairs are in the nature of trust property may affect the application of the statute of limitations, and of the rule that interest is not ordinarily to be paid on an unliquidated debt except from the time of action brought, but on what principle should he ever be charged with it unless for his wrong in improperly using or neglecting to account for the trust fund?

In this case the court below found there had been no such wrong on the part of the defendant, and the evidence seems fairly sufficient to warrant it. This was a question of fact.

The next assignment of error insisted on is that the court did not charge the defendant with the value of certain fixtures or furniture—stove, pipe, show cases, lamps and chandeliers—belonging to the firm and used in its store. All that we find in the record respecting them is from the testimony of the defendant, taken August 18, 1890—more than thirteen years after the partnership was formed, and over eleven after it was dissolved. He stated that their original price was \$602.89, but there was no evidence of their value at the time of the dissolution or at the time he testified. About a year after the dissolution he removed his stock from Kenney to Clinton. Whether he then so removed these articles does not appear. His statement is that he was not still using any of them in his private business, and that to take care of them he had put them in the cellar. How long since he had ceased to use them the

Randolph v. Inman.

evidence does not disclose. Nor does it show that he ever used them wrongfully as against the plaintiff in error. He was authorized to continue to use them after the dissolution in closing up the affairs of the firm. He says the understanding was that when the jobber creditors should all be paid in full they would settle as between themselves; that from collections made he got them all paid within a little more than a year, and then promptly advised complainant by letter of May 21, 1880, of that fact and of his readiness to settle. The record contains half a dozen similar letters from him, inviting and urging a meeting for settlement, and running down to 1887. The failure to make it amicably clearly seems to have been the fault of complainant. Nearly nineteen years elapsed after these articles began to be used before the master's report and the final decree, promptly following it, were made. It is therefore not strange that neither the master nor the chancellor took them into account—reasonably inferring or assuming that they were of no value, and if of any, that it would not be equitable under the circumstances to charge it to the defendant.

By the master's report the amount found due to complainant was \$5,580.05, which was reduced by the court to \$3,112.85. This reduction was caused in part by deducting from the invoice of the firm stock the sum of \$824.68 for goods taken by Charles C. Randolph, a son of complainant, who succeeded him in the firm on March 4, 1879, but in June following withdrew his stock and removed to Wellington, Kansas. And this deduction, it is said, was error.

It is conceded that complainant gave or sold to Charles a \$3,000 interest in the stock, and that this amount was properly deducted from the invoice as between complainant and defendant. But it appears that when Charles went to Wellington, he withdrew not only \$3,000 worth of the stock, but as Inman claimed and is not disputed, \$824.69 in value thereof besides; and that to entitle him to do so, his father assumed a firm debt of the parties hereto to the bank of John Warner & Co., of \$904.30, for which he took his son's note and paid the bank debt. The court deducted from the invoice the sum of \$3,824.68.

Now, it is claimed that although \$3,000 was properly deducted, because that amount was actually withdrawn from the stock of J. H. Randolph and Drew Inman and not paid for to that firm, the further deduction of \$824.68 was improper, because though that additional amount of stock was also actually withdrawn, it was paid for in effect to the firm by J. H. Randolph.

We fail to understand why the fact that the firm received payment for the one and not for the other of these amounts, should have the effect so claimed, upon the statement of the invoice of stock, whatever it might have upon the other items in the statement of the whole account between these parties. So much of the amount, as invoiced, was in fact so disposed of as to assume a different form of debit and credit as between them. It was no longer in goods of the firm, and therefore was not properly so invoiced. If Randolph disposed of \$3,000 worth of it and did not pay it to the firm, he should have been charged with the whole amount as due to the firm for goods so disposed of, and credited by the firm with his interest in them as a member of it. If he also disposed of other goods, amounting to \$824.68, and paid that amount for the firm, he should have been charged for the goods and credited for the payment, leaving no balance either way; but neither amount should have been invoiced as existing goods of the firm. They were alike just as much out of its stock as if they had been destroyed by fire. We think the deduction was proper. Whether the amount was or was not otherwise taken into the account, we are not advised by counsel. Our conclusion on this point is based upon their own statement of the facts and quotations from the testimony of the parties.

The last ground of complaint is that the decree charged the costs to complainant equally with the defendant. This was a matter within the judicial discretion of the chancellor. Considering that the litigation was caused by the fault of complainant, and that he failed to so large an extent as to his claim, we are not prepared to say that the order on this point was an abuse of that discretion. The decree will be affirmed.

B. B. Cassiday v. John Ball & Co.

1. **MORTGAGES—Waiver of Lien.**—The supposed waiver by appellees of the superior lien of their mortgage was purely voluntary, was made without knowledge that a portion of the mortgaged property had been disposed of, and this court holds that they were not concluded by it, especially as they seized the property under the mortgage before the executions were levied on it.

2. **REPLEVIN—When Demand Is Not Necessary.**—Demand is not necessary to enable one whose property has been taken upon an execution against another person, and is claimed and held as his property, to maintain replevin against the officer.

Replevin. Appeal from the Circuit Court of Montgomery County; the Hon. ALEXANDER W. HOPE, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

ZINK & KINDER, attorneys for appellant.

LANE & COOPER, attorneys for appellee.

OPINION PER CURIAM.

Appellant, a constable, levied an execution on chattel property, on which appellees held a chattel mortgage.

Appellees replevied the property, prevailed on a hearing, and the constable appealed.

It appeared appellees had possession of the property when the levy was made. The execution did not run against them.

Demand was not necessary to enable him to maintain replevin. 5 Amer. & Eng. Ency. of Law, 528 m.

The amended record filed in the cause shows the lien of the mortgage had been lawfully extended by compliance with the provisions of Section 4 of an Act of the General Assembly, in force July 1, 1891. (3 Starr & Curtis Stat., p. 892), and was in full force as a prior lien as against the executions.

The contention of appellant was, appellee had by agree-

ment waived the lien of the mortgage in favor of the execution creditor; that appellant had taken action upon the faith of such waiver, and that appellee became estopped to assert the priority of his lien as against the execution.

The supposed agreement is alleged to have arisen out of a conversation had between the attorneys of appellant constable and John Ball of the appellee company, and another between said Ball and the constable.

The purport of both were that the property mortgaged to Ball & Co. was probably worth more than the amount of their debt, and that he (Ball) had no desire to protect any of the judgment debtor's property against the execution and did not care if the executions were levied on some of the property if enough was left to pay his debt. Ball wanted appellant to pay the amount secured by the mortgage and take the mortgage but the proposition was declined.

After the conversation had occurred, Ball learned a portion of the property included in his mortgage was missing, and at once took possession of the remainder under his mortgage, and put same in the custody of an agent appointed by him to hold possession thereof for his firm.

The constable seized the property while it was so in the possession of such agent of the appellee firm.

The supposed waiver by appellees, of the superior lien of their mortgage in favor of the executions was purely voluntary and was made without knowledge, a portion of the mortgaged property had been disposed of, and we think the court correctly ruled, they were not concluded by it especially in view of the fact they seized it under the mortgage before the executions were levied upon it.

We find no error in the rulings of the court upon the propositions of law.

The judgment is affirmed.

James L. Hight and Edward L. Hight v. Edward B. Sanner.

1. *ASSUMPSIT—For Money Had and Received—When it Will Lie.*—A person who knowingly receives the proceeds of property unlawfully sold by another, may be compelled to account therefor in an action for money had and received; and it is immaterial whether he knew who was the owner, or how much was due, or whether he promised to pay the proceeds of the sale to the owner.

2. *TRIALS—Objections Waived.*—A person who requests that a special interrogatory be submitted to the jury, thereby admits that the question involved is properly before the jury, and can not, on appeal, be heard to object to instructions on the same question, on the ground that there is no evidence on which they can properly be based.

Assumpsit, for money had and received. Appeal from the County Court of Macon County; the Hon. WILLIAM L. HAMMOND, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

SHELLEY BROTHERS, attorneys for appellants; W. C. JOHNS, of counsel.

LEFORGEE & LEE, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was assumpsit by appellee against appellants. The declaration contained the common counts and several special counts, also an amended additional count. The latter averred that the plaintiff delivered into an elevator owned by John W. Walker 1,791 bushels of corn, worth twenty-five cents per bushel, which was stored there for the plaintiff, and was his property; that defendants, well knowing the facts, appropriated the corn to their own use, and thereby became indebted to the plaintiff for the value of the corn, and being so indebted, promised to pay, etc., etc.

The defendants plead non-assumpsit, and the issue being tried by jury, there was a verdict for plaintiff for \$403, upon which judgment was rendered, and the defendants appealed.

It appears from the evidence that John W. Walker was engaged in the business of buying and selling grain, and that he had an elevator in which he stored corn belonging to himself and corn belonging to others deposited for storage. He charged and received compensation for such storage, but mingled his corn and that of depositors in a common mass, so that when the depositor called for his corn, or gave an order to sell it, the number of bushels deposited would be taken out of the elevator and disposed of as required by the depositor. The appellants, defendants below, were bankers with whom Walker kept an account. He was in the habit of depositing his drafts with them for grain sold by him, and of drawing checks on them for grain purchased and for other purposes. His account becoming largely overdrawn, J. L. Hight, one of the appellants, urged him to make his balance good, and asked him whether he could not sell grain to raise what he owed them. Walker testifies that he told Hight he had not much in the elevator that belonged to him, but that he would ship and sell all, including that of depositors, if they (the appellants) would pay the claims of depositors therefor; and that while Hight did not expressly say they would do so, he told him to go ahead, ship and sell.

Accordingly corn was shipped in large quantities and sold, the drafts therefor being deposited with appellants, who collected the money thereon. The appellee had at that time some 1,791 bushels of corn on store in the elevator, and there was a considerable quantity belonging to other parties, also on storage. These shipments were made without consulting the owners and without their knowledge, as we infer from the proof. The appellee called on Walker for his corn, and was informed that it had been shipped, and that appellants had the money for it, and that they would, or at least should, pay him the proper amount. Appellees deny that they agreed to pay for corn of depositors. E. L. Hight, who was present at the time of the conversation referred to by Walker, corroborates J. L. Hight in his version of it. They say that Walker did offer to

ship and sell the corn on storage if they would pay the owners and that they declined to do so, and only wished him to sell what belonged to him and give them the proceeds. He says he told them that appellee had corn there, and they deny that the name of appellee was mentioned in that connection.

It is not to be doubted that Walker sold the corn of his depositors and turned the proceeds of it, or some of it, over to the appellants by depositing the drafts with them, but the question in dispute is whether the appellants received the money, knowing it was for corn belonging to depositors, and whether they did so with an understanding that they would satisfy the claim of depositors. There is no proof that they ever had any manual control of the corn, that they in fact handled it as charged in the amended additional count, but if the testimony of Walker is true, they received the proceeds of corn belonging to sundry depositors, of whom appellee was one, and agreed to pay for it to the proper owners, upon which state of facts recovery might be had under the common count for money had and received. As stated, however, this is vigorously denied by appellants. It is not easy to understand why they should make such an arrangement, what they were to gain by it, and why they should incur the risk of trouble very likely to follow, but it is not impossible and it was a question for the jury.

Two special interrogatories were put to the jury at the instance of appellants, as follows:

"1. Does the preponderance of evidence show that Hight & Son took and received the corn, knowing it belonged to Sanner?"

- "2. If the money from the sale of Sanner's corn came into the hands of Hight & Son, does the preponderance of evidence show that Hight & Son at the time had notice that the money was the proceeds from the sale of Sanner's corn?"

The jury answered both of these in the negative, and yet found the general verdict for plaintiff.

It is urged by appellants that the special findings are inconsistent with, and must control the general finding, and that the judgment should have been accordingly. Appellee insists there is no inconsistency. The answer to the first interrogatory is inconsistent with the general verdict for plaintiff upon the additional count, for that count, as well as the other special counts, involves the proposition that the defendants appropriated the corn, knowing it to be the plaintiff's. The answer to the second is inconsistent with the general verdict if it was necessary to a recovery under the common count for money had and received, to show that defendants, when they received the money, knew whose corn was thereby represented.

It is forcibly argued that if defendants knew Walker was selling the corn of his depositors, which he had no right to do, and that the money was the proceeds of such illegal sale, it is not material whether they knew to whom it belonged. If they aided, or assisted, or co-operated with Walker in such an illegal disposition of the corn, no matter whether they knew who owned the corn, their action might be regarded as tortious, and the money coming to their hands by such means might be recovered under the common count for money had and received. 2 Gr. Ev., Sec. 120. So also if there was no wrongful intent by them or by Walker if they promised him to pay out the money to the owners, whether they at the time knew who the owners were or not. In either of these supposable aspects of the matter there was no inconsistency between the special findings and the general verdict.

Some complaint is made of the ruling of the court in giving, refusing and modifying instructions, but after a careful examination of them we think the law of the case was, on the whole, fairly presented. Two instructions, the fifth and sixth, given at the instance of the plaintiff, were not applicable under the evidence because there was no proof that defendants appropriated the corn, but we think the defendants ought not to urge this objection when they asked the court to submit the first interrogatory to the jury,

which assumed there was evidence tending to show that they did take the corn.

A careful consideration of the case makes it apparent that the real question at issue was whether defendants knowingly received the proceeds of corn unlawfully sold by Walker. If they did it is immaterial whether they knew who were the owners or how much was due to each, or whether they promised him to pay over to the owners. This was for the jury and we can not say the verdict is unwarranted by the proof. The defendants knew that Walker had but little corn of his own in the elevator, and yet they knew he was disposing of nearly, if not quite, all therein. Although, as we have already observed, it is not apparent why they should have consented to the arrangement by which he was to sell and turn over the proceeds to them, they to pay out to the depositors, yet they may have participated in the irregular transaction to the extent of receiving the money, knowing how it was obtained, though not knowing who were entitled to it, which as we have seen would be sufficient to make them responsible to the owners of the corn, who might in such case waive the tort and sue in assumpsit for the proceeds.

The issue for the jury was largely dependent upon the credit to be given, the witnesses in view of all the circumstances in proof. We do not feel at liberty to interfere with the conclusion reached, and therefore the judgment will be affirmed.

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172 391

Robert P. Barnard v. Commissioners of Highways of the Town of Nokomis et al.

1. *INJUNCTIONS—To Restrain a Threatened Nuisance—Proof Required.*—Where commissioners of highways are about to remove a bridge and fill the space covered thereby, and there is a reasonable doubt as to whether such action will prove injurious to the private rights of a complainant or become a private nuisance, an injunction will be denied until the question is determined by the actual use of the property.

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Barnard v. Commissioners of Highways.

Injunction.—Appeal from the Circuit Court of Montgomery County; the Hon. A. W. HOPE, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

JAMES M. TRUITT, attorney for appellant.

WM. M. TODD and LANE & COOPER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery filed by appellant to restrain appellees from removing a certain bridge from a highway and filling the space covered thereby with earth, which, as alleged, would obstruct the natural flow of water from the land of appellant. It was averred that the natural course of drainage was from the appellant's land over the land traversed by the highway, and that the grade, having been raised, kept the water back, so that the bridge was necessary to permit the escape of the water in the natural course and that after the removal of the bridge and the filling of the space thereunder there would be no outlet.

The principal question of fact raised by the answer was as to the natural course of drainage. The testimony was taken by the master on a reference for that purpose and to his report, which was adverse to appellant, various exceptions were taken.

The exceptions were overruled and a final decree dismissed the bill.

Many witnesses were examined and the proof is in hopeless conflict as to the chief issue. It is not deemed necessary to attempt a statement or analysis of the testimony.

That work has been done by counsel from their respective standpoints and we have attentively considered all that has been adduced and have carefully read all the testimony as it is found in the abstract.

In Thornton v. Roll, 118 Ill. 350, it was said, quoting from Wood on Nuisance, Sec. 788:

“But to entitle a party to relief in such cases a very strong case must be made by the bill and sustained by the proof—as if on coming in of the answer the fact of contemplated

nuisance is fully denied, or if upon the facts there is a reasonable doubt of the effect of the proposed erection the injunction will be denied until the question of nuisance is determined by the actual use of the property."

In *Hotz v. Hoyt*, 135 Ill. 388, the court again state the rule as thus announced and support it by authorities cited. Applying the rule to the case as made by the proof we are inclined to agree with the conclusion reached by the Circuit Court. Intelligent and apparently honest witnesses disagree as to whether the water would naturally flow from the appellant's land over the land traversed by the road, and whether the closing of the space covered by the bridge would affect the appellant injuriously.

By this testimony the matter is left in great uncertainty, and in such a state of proof an injunction should not be granted. We think the decree was right and it will be affirmed.

Oliver J. Bailey v. Christian Heintz.

1. **NUISANCES**—*Measure of Damages for*.—If the placing of obstructions in certain channels of the stream by the defendant in this case was unlawful and caused a nuisance, the law will not regard the structure as permanent, and plaintiff can recover only such damages as had accrued prior to the bringing of the suit.

2. **DAMAGES**—*Held Excessive*.—The assessment of damages in this case was for the full value of the property injured, and even if prospective damages were allowable, would be unreasonable and exorbitant, as the plaintiff has not been deprived of the whole property and will not be, in any event.

3. **APPELLATE COURT PRACTICE**—*On Motion for Leave to File Remittitur*.—A motion for leave to file a remittitur, made after final judgment in this court, comes too late and will be denied.

Trespass on the Case, for diverting the waters of a stream. Appeal from the Circuit Court of Tazewell County; the Hon. N. W. GREEN, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897. Motion for leave to file remittitur denied. Opinion filed July 8, 1897.

H. C. FULLER, attorney for appellant; WM. DON MAUS, of counsel.

J. A. WEIL and T. N. GREEN, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

Action on the case alleging that defendant unlawfully diverted the waters of a certain stream which naturally flowed across his land so that said waters were thrown upon the land of plaintiff whereby the same was damaged, etc.

Trial by jury; verdict for plaintiff \$2,000, and judgment thereon, from which the defendant has appealed.

The important question of fact was whether the obstructions which defendant placed in certain channels of the stream (which channels he claims had been abandoned so that what he did merely resulted in the retention of the deposits thrown upon his land) was the substantial cause of the overflow of which the plaintiff complained.

It is not very apparent that the defendant was responsible for all the damage sustained by plaintiff, or for any considerable part of it, but as the case must be tried again no opinion need now be expressed upon that point.

Conceding all that was urged for plaintiff in this respect it is clear that the damages assessed are excessive.

The entire value of the plaintiff's property was from \$1,500 to \$2,000, according to his proof. The overflow complained of was for the two seasons preceding the trial, and the loss of the crops of fruit, etc., did not exceed two or three hundred dollars per annum. In view of the size of the tract, three acres, of which two were devoted to corn and other such crops, and of the character of the improvements this estimate of damage must be considered very high.

We think the plaintiff could recover only for such damages as had accrued prior to the bringing of the suit.

If the act of defendant was unlawful and caused a nuisance the law will not regard the structure as permanent. Schlitz Brewing Co. v. Compton, 142 Ill. 511.

Bailey v. Heintz.

The assessment here was for the full value of the property. Even if prospective damages were allowable, such a figure would be unreasonable and exorbitant, as the plaintiff has not been deprived of the whole property, and will not be in any event. On the contrary, if the process of filling by deposits from the annual overflow shall be continued, the land will in a very few years be more valuable than it was before. In no view of the case, as shown by the present record, can the legal damages be as great, or approximately so, as allowed by the verdict.

The judgment must therefore be reversed and the cause remanded.

OPINION PER CURIAM ON MOTION FOR LEAVE TO FILE REMITTITUR.

This is a motion by the appellee, Christian Heintz, for leave to enter a remittitur in the sum of \$1,200 herein, or such sum as to the court may seem just, under the evidence and the law applicable to the case.

This was an action on the case brought in the Circuit Court of Tazewell County by appellee to recover damages from appellant, as he claims, for diverting the waters of a certain stream of water which naturally flowed across his land, so that said waters were thrown upon the lands of appellee, whereby the same were damaged.

There was a trial by jury in the court below and the verdict of the jury was for the appellee. Damages assessed at \$2,000, and judgment rendered thereon for that sum. Appellant brought the case to this court by appeal. It was heard at the November term, 1896. The opinion of this court was filed June 16, 1897, reversing and remanding this cause, and the motion of appellee for leave to enter a remittitur was filed June 29, 1897.

The motion for leave to enter the remittitur comes too late. The final order and judgment of this court was entered before this motion was filed. Parties can not be allowed to speculate over the results in the administration of justice. The motion is denied.

Samuel Eppstein et al. v. Herman Nathan et al.

1. JURISDICTION—*Section 3 of the Chancery Act Construed.*—Section 3 of the Chancery Act, requiring suits affecting real estate to be brought in the county where such real estate lies, does not apply to a case where the relief sought does not require the court to deal directly with the estate itself, nor authorize a creditor to maintain a bill to set aside a fraudulent conveyance of his debtor, outside of the county where the debtor resides or may be found. In such a case the court declares the conveyance void as an obstruction to the creditor's legal remedy, but does not act upon the land itself.

2. FREEHOLD—*When Not Involved.*—A proceeding by bill in chancery to set aside a conveyance of real estate as in fraud of the rights of a creditor of the grantor does not involve a freehold, and an appeal lies to this court from a decree in such a case.

BILL, to set aside a fraudulent conveyance. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

GERE & PHILBRICK and WILLIAM E. O'NEILL, attorneys for appellants.

THOMAS J. SMITH, attorney for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

Herman Nathan filed his bill in chancery in the Circuit Court of Champaign County against Samuel Eppstein and Paulina Eppstein, and caused a summons to be issued to the sheriff of Cook county. The writ was served upon said defendants in Cook county, where they then resided and were found. They filed their plea to the jurisdiction, alleging that they were residents of, and were served in Cook county, and that the bill did not affect real estate in Champaign county. The plea was held bad on demurrer, and, failing to answer further, a decree *pro confesso* was entered and the cause was referred to the master to take evidence.

At the next term the complainant took leave to amend

his bill, and a rule was entered requiring defendants to answer, and upon their failure so to do, a decree *pro confesso* was again entered, from which the present appeal is prosecuted.

The amended bill averred that complainant held a judgment in the Circuit Court of Cook County against said Samuel Eppstein, upon which an execution was issued to the sheriff of Champaign county, and that a levy thereof was made upon certain real estate in the last named county as the property of the said defendant, Samuel Eppstein, and that a certificate of levy was filed in the office of the recorder of said county; that prior to the rendition of said judgment the said Eppstein was the owner of said real estate, and obtained credit from complainant upon the faith of such ownership; that said Eppstein conveyed said property without consideration to one Callon, who also conveyed the same without consideration to the said Paulina Eppstein, and that these conveyances were for the fraudulent purpose of hindering and delaying the creditors of said Samuel. Prayer that the said conveyances be held null and void, and that the title to said premises be declared to be in said Samuel and subject to sale under said judgment. The question is now presented whether the Circuit Court of Champaign County had jurisdiction of the defendants, and this depends on whether the suit affected real estate within the meaning of the third section of the chancery act. In the case of *Enos v. Hunter*, 4 Gilm. 211, the section was considered, and again in *Johnson v. Gibson*, 116 Ill. 294. In the former the object was to compel a conveyance of land in another county, and in the latter the point was with reference to a decree setting aside certain conveyances of lands lying in another county as fraudulent as against creditors. It was held that such proceedings do not affect real estate within the meaning of the statute. In the latter case the court, after some discussion of the subject, remark:

“So, if a failing debtor makes fraudulent conveyances of his real estate for the purposes of hindering and delaying his creditors, the latter may maintain a bill in

equity in any jurisdiction where the debtor and fraudulent vendee may be found, for the purpose of having them declared void as to the complaining creditor. In such case the court does not act upon the land or make any reference to it. It simply declares a certain transaction relating to land fraudulent as between the complainant and the offending parties, and thus removes it as an obstruction to the creditor's legal remedy."

We are inclined to hold upon the authority of these cases that the objection to the jurisdiction was well taken, and that it was error to sustain the demurrer to the plea. Indeed it was not the proper practice to interpose a demurrer to the plea. The plea should have been set down for hearing, but the parties treated the demurrer as equivalent thereto, and it is immaterial now.

The plea seems to be full and formal, and we see no reason why the defendants should have been deprived of the right to be sued only in the proper county, a right which is substantial and valuable.

It is suggested a freehold is involved, and that this court has therefore no jurisdiction of the subject-matter. Citing *Humphreys v. Roth*, 57 Ill. App. 40.

The opinion there discriminated between that case and one like the present. We think no freehold is involved. We feel constrained to hold that for the error indicated the decree must be reversed and the cause remanded.

Harden Cox, Sheriff, v. Ferdinand Stern.

1. *AFFIDAVIT—Defective Statement of Venue Cured by Seal.*—The venue of an affidavit was, State of Illinois, County of Illinois, but by the notarial seal it appeared that the officer was a notary of Cook county. *Held*, that it was clear what was the venue and that the affidavit was sufficient.

2. *SAME—Jurat not Signed—Parol Evidence Admissible.*—Where an affidavit is signed, but no signature is attached to the certification of the officer before whom the affidavit is made, parol evidence is admissible to show that the affidavit was in fact sworn to.

Replevin, by a mortgagee against a sheriff. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPPER, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 18, 1897.

OWEN P. THOMPSON and JOHN A. BELLATTI, attorneys for appellant.

EDWARD P. KIRBY and WILLIAMS, LINDEN, DEMPSEY & GOTT, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

Replevin by mortgagee of chattels against sheriff holding under a levy of execution against mortgagor.

The question is whether an affidavit for extension of mortgage was valid and sufficient.

The affidavit, professing to be made by the mortgagors and by the attorney of the mortgagee was signed by all of these, and sworn to by the latter before a notary public of Cook county.

The venue of the affidavit was State of Illinois, County of Illinois, but by the notarial seal it appeared the officer was of Cook county.

We think it was thereby made clear enough what was the venue, but in addition proof was admitted that the affidavit was actually made before the notary in said county, and that the mortgagors made their affidavit before a justice of the peace in Morgan county where the mortgage was executed. The propriety of permitting such proof is the chief question in the case, indeed the only one requiring decision. As already suggested it is thought no such proof was needed in aid of the affidavit by the attorney of the mortgagee.

Immediately following the jurat, signed by the notary as to the attorney of mortgagee, is the following :

"Subscribed and sworn to by the said Henry Schoenfield and Bessie Schoenfield (mortgagors) before me this — day of March, 1895."

But the justice of the peace did not attach his signature

to the jurat. He however wrote on the back of the affidavit a certificate showing that the mortgagors appeared and acknowledged the execution of the instrument. This certificate was not required, nor efficient for any purpose, but it does not vitiate, and the question recurs whether parol proof was competent to show that the mortgagors did actually swear to the affidavit.

Kruse v. Wilson, 79 Ill. 233, seems to support, in principle, the contention of appellee that such proof is competent, and this is in accord with the current of authority in other States.

Appellant cites several rulings by our Supreme Court to the effect that parol proof can not be heard to show the existence of matters which should be set forth in the affidavit, a very different thing, and so those citations are not in point. We are inclined to agree with the Circuit Court and its judgment will be affirmed.

Allen J. Watkins v. Andrew J. Newman.

1. *CONTRACTS—In Writing May be Changed by Subsequent Oral Agreement.*—A and B entered into a written contract, by which A was employed to negotiate for a sale of certain land belonging to B at a stipulated price. By a subsequent oral agreement, terms of sale previously discussed were substituted for the cash payment implied by the writing. *Held*, that such substitution was legally made; that the court properly admitted proof thereof, and properly instructed the jury upon that view of the law.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

F. K. DUNN, attorney for appellant.

J. M. HAYES and JAS. W. & EDWARD C. CRAIG, attorneys for appellee.

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MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT. -

This suit was brought originally before a justice of the peace and was removed by appeal to the Circuit Court, where the plaintiff obtained a verdict, and judgment thereon, for one hundred dollars. The defendant prosecutes the present appeal. The claim of the plaintiff is for breach of contract by which, as alleged, the defendant placed his farm in the hands of the plaintiff for sale, on commission. The breach is that defendant himself sold the farm before the expiration of the time fixed within which the plaintiff might sell it, although the plaintiff had secured a buyer who was ready to take the property upon the terms proposed.

It appears that there were some verbal negotiations between the parties, and that the price which the defendant was willing to accept was \$13,000. According to the proof offered by plaintiff he had a buyer in view at that price, and the only question between plaintiff and defendant was as to the terms of payment then agreed on.

Plaintiff insists it was understood that if the buyer would assume the incumbrances on the land for \$6,000 and pay \$3,000 in cash, the residue could be arranged by deferred payments, the principal point being to obtain the \$3,000 cash payment in order to meet certain pressing demands, in the way of judgments against defendant. He also insists that the name of the proposed buyer was known to defendant, and that it was also known to him how far the matter had progressed with the buyer, and that plaintiff was to obtain for the buyer the sum of the required cash payment from another party.

When the business had reached this stage the plaintiff requested the defendant to sign a written contract in order to fix the rate of his commission, as he says, and thereupon the following instrument was signed by defendant and delivered to plaintiff :

"OFFICE OF

A. J. NEWMAN & Co., Real Estate and Loan Agents,
Southeast Corner of the Square,

CHARLESTON, ILL., November 12, 1895.

It is hereby agreed between the above named firm and the undersigned that his property, consisting of 200 acres in Hickory township, is listed with them for sale at \$13,000, and their commission shall be one and a half per cent when the sale is made, if made by Friday, November 15th.

A. J. WATKINS."

According to the plaintiff there was a conversation between him and defendant shortly after the paper was executed, in which the defendant told him to go ahead and make the sale as it had been talked over before, and he thereupon proceeded with the arrangement with the proposed buyer, secured the money for him to make the cash payment, and it was understood that the deal should be closed within the time fixed. In this his testimony is corroborated by that of other witnesses, including the proposed buyer and the party who was to furnish the money. Before the 15th of November the defendant himself sold the property for \$13,500.

It was urged below and is here that all negotiations between plaintiff and defendant were merged in the written agreement. The court below so held but permitted plaintiff to show the subsequent verbal arrangement by which plaintiff was to go ahead and make the sale according to the terms previously understood. The defendant however insisted and still insists that this written agreement calls for a sale for cash, and that thereby all that had passed between the parties looking to a sale on different terms had been abrogated, and was not to be considered in any way or for any purpose.

This insistence would be well enough, and fatal to the plaintiff's claim, were it not for the subsequent understanding by which the terms of sale previously discussed were substituted for those implied by the writing.

No reason is perceived why it was not competent to make such substitution orally, and we think the court properly

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admitted proof for that purpose, and properly instructed the jury upon that view of the law.

The evidence for defendant conflicts with that for the plaintiff as to whether there was such a subsequent arrangement, but the issue thus presented was for the jury, and there is no occasion to interfere with their conclusion. The case made by the plaintiff established a breach of contract by defendant, and the damages awarded by the verdict are within the range of the proof.

We find no error and think the judgment should be affirmed.

F. W. Beardsley et al. v. Henry A. Brown et al.

1. **MECHANIC'S LIENS**—*Application of Section 24 of the Mechanic's Lien Act.*—Section 24 of the mechanic's lien law applies to a public school building, erected by a board of education, as such a building is within the description of a "public improvement," and a school board is within the general term "municipality."

2. **SAME**—*Lien Given by Section 24 of the Mechanic's Lien Act, Good Against an Assignment.*—The lien created by section 24 of the mechanic's lien act can not be deranged or displaced by an order given by the contractor on the fund, and an assignment or transfer thus attempted does not set aside the lien provided by the statute.

3. **BONDS**—*A Bond Given by a Building Contractor Construed.*—A bond given by a building contractor was conditioned upon the performance of the contract, and all the covenants and agreements therein contained and the payment of all liens. All claims of the obligee in the bond having been discharged, it was held that sub-contractors could make no claim under it.

Bill of Interpleader.—Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

J. H. MOFFETT & McQUISTON and A. J. BARR & MAYNE POLLOCK, attorneys for appellants.

KERRICK, SPENCER & BRACKEN, attorneys for appellees **T. F. Harwood & Sons et al.**, complainants in cross-bill.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The Board of Education of Kickapoo Union School District, No. 22, etc., filed its bill in chancery alleging that it entered into a written contract with one H. A. Brown for the erection of a school house for said district at the price of \$4,398 payable in five installments. A copy of the contract, which is very lengthy, was filed with the bill, but it is not necessary now to state its provisions in detail. It was alleged that said contractor having failed to complete the building according to the terms of the contract, the complainant took the matter out of his hands, pursuant to a provision of the contract, and completed the building, and that there still remained due said Brown a considerable sum of money, which complainant was ready and willing to pay to him or to the sub-contractors who were claiming it, some of them demanding priority over others. Wherefore the bill prayed that the said Brown and said sub-contractors should interplead in respect to said unpaid amount.

It was further alleged that when the written contract was entered into, said Brown gave a bond with sureties for the faithful performance of his said undertaking, and that complainant was ready to assign said bond for the benefit of the sub-contractors, if so required by the court.

The contractor and Mrs. H. A. Brown, who signed the contract with him, his sureties on the bond and his creditors, the sub-contractors, were all made parties to the bill.

Such proceedings were had that it was determined there remained in the hands of the complainant unpaid on said contract the sum of \$1,189.13, and it was ordered that upon payment thereof complainant should be dismissed, its costs of the suit to be taxed and deducted from said fund. It was further ordered that the defendant creditors should interplead, and the cause was referred to the master to inquire and report in what way they were entitled to participate in the fund, which had been deposited in the custody of the court. The report of the master was subsequently presented, and this was followed by a decree finding the amount due each of the sub-contractors, the aggregate being

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\$3,095.96, leaving a deficit of \$2,023.38 (which it was ordered should be paid into court by the contractor and Mrs. H. A. Brown who signed the contract with him), and it was ordered that the sub-contractors should share pro rata in the fund then in the custody of the court.

An appeal has been prosecuted by two of the sub-contractors, F. W. Beardsley and others, partners, as The Spaulding Lumber Company, and Meyers & Miller, who insisted below, and do now, upon a priority over the other sub-contractors in respect to said fund, because of certain orders given them by the contractor whereby the complainant was requested to pay the amounts due them out of any money payable to said contractor.

Section 24 of the lien law, provides that, "Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds, or warrants due or to become due such contractor for such improvement. Provided, such person shall, before any payment or delivery thereof is made to such contractor, notify the officials of the State, county, township, city or municipality, whose duty it is to pay such contractor, of his claim by a written notice and the full particulars thereof. It shall be the duty of such officials so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit on the contract price to be paid to such contractor. Any official violating the duty hereby imposed upon him shall be liable on his official bond to the person serving such notice, for the damages resulting from such violation, which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid pro rata, in proportion to the amount due under their respective contracts."

Appellants first present the question whether a public school building erected by a board of education is within this section.

We are of opinion this question should receive an affirmative answer. Such a building is within the description of a "public improvement," and a school board is within the general term, "municipality."

No sound reason upon grounds of public policy appears to the contrary.

The building itself is not subjected to the lien; only the fund appropriated for its construction.

The municipality is not held responsible for any disregard of the rights of lien holders; only the officials who violate the duty imposed by the statute. Such a provision is beneficent in its operation, to the public, by inducing greater competition, and to those who furnish material or labor to the contractor by permitting them to participate in the fund set apart for the erection of the building.

It is insisted however by appellants that if the case be within the statute, still they have priority over the other sub-contractors (who, as well as appellants, gave the requisite notices of their claims pursuant to the quoted section) because of the orders given them by the contractor.

They urge that thereby an equitable assignment was effected in their favor, which should be recognized and protected.

The section provides: 1st. That any person furnishing material or labor to the contractor shall have a lien upon the money, bonds or warrants due or to become due the contractor for the improvement, provided the proper notice is given. 2d. There shall be no priority between persons serving such notices. Comparison of this section with others of the act will show a clear purpose to give the sub-contractor a lien equal to that of the contractor in all respects. The rights thus secured can not be deranged or displaced by an order given by the contractor on the fund. The assignment or transfer thus attempted can not set aside the lien provided by the statute.

It is familiar that an equitable assignment of a chose in action is subject to all equities against the assignor. The assignee can occupy no position better than that of the assignor, and must take the thing assigned subject to all

the rights which third persons have in respect thereto as against the assignor.

We are of opinion the order for distribution pro rata was properly made.

It is assigned as a cross-error by the appellees that the court should have held the sureties on the contractor's bond for the amount of the deficit, and the case, *The City of St. Louis v. Von Phul*, 34 S. W. 843, is cited as authority for the position.

Waiving the question whether those sureties could be deprived of their right of trial by jury, and made to answer, if answerable, in this proceeding, we think the position assumed is untenable.

The condition of the bond is as follows :

"Now, if the said Henry A. Brown shall duly perform said contract and all the covenants and agreements therein contained, and shall pay and discharge from said premises all liens for material, labor or otherwise, which may accrue on account of said building contract, then this obligation to be null and void, otherwise to be and remain in full force."

So far as the obligee in the bond is concerned, the contractor is under no obligation.

There are no liens upon the premises, and indeed there could be none. The complainant has no cause of action against him in regard to the contract, and there is nothing for subrogation. The sub-contractors can have no remedy standing in the shoes of the complainant, because the complainant has not, and never had, any cause of action on the bond.

The sureties did not undertake to protect sub-contractors and their obligation can not be so extended. In the case cited, the condition of the bond expressly provided for payment to the proper parties of all amounts due for labor and materials used and employed in the performance of the contract, and that suit might be brought in the name of the obligee for the use of any material man, laboring man or mechanic for any breach of that condition. It was held in an action so brought that the bondsmen were liable to a

material man. The case is not in point. The plaintiff there was not seeking subrogation, but merely enforcing a right which the bond expressly gave him.

No other errors are assigned and the decree will be affirmed.

A. B. Hoblit, Adm'r, v. City of Bloomington.

1. MEASURE OF DAMAGES—*For Failure to Pay a Debt.*—Ordinarily, if not always, the measure of damages for retaining money or failing to pay a debt, is the interest thereon. What the creditor might have made by the use of the money in trade is purely a matter of speculation and can not be regarded, and attorney's fees are not allowable except in those special cases where the statute so provides.

2. INTEREST—"Unreasonable and Vexatious Delay."—It is not fairly to be inferred from the declaration in this case that the defendant did more than delay payment until its liability was established by law, or that in this there was any bad faith or evil design. This is not "unreasonable or vexatious delay," within the statute.

3. SAME—*Should be Claimed in Suit for Principal.*—Whatever be the right of plaintiff to interest, he should have claimed it in the suit for the principal debt, and having failed to do so no reason is perceived why he should be permitted to do so now and thus split his cause of action.

Trespass on the Case, for breach of a statutory duty. Appeal from the Circuit Court of McLean County; the Hon. THOS. F. TIPTON, Judge presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

A. E. DEMANGE, attorney for appellant.

JACOB P. LINDLEY, city attorney, for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The question is as to the declaration filed by plaintiff, to which the Circuit Court sustained a general demurrer. In effect, the demand upon which the plaintiff sought to recover was that the city, having in its treasury a sum of money accruing from a special assessment, to which the plaintiff's intestate was entitled, had withheld payment thereof until coerced by legal proceedings, and that by reason of the

delay and expense of such proceedings plaintiff was damaged in being deprived of the use of the money and of great gains and profits (from the use of the same presumably, though not so in terms averred), and the expense of counsel.

The pleading is to be construed most strongly against the pleader, and it is to be inferred that there was a controversy as to whether the plaintiff was entitled to the money, which was settled by legal proceedings in favor of the plaintiff.

There is no averment of fraud, deceit or any misconduct by the defendant beyond what may be implied in any case when a demand is disputed until a legal adjudication can be obtained.

It is familiar, in this State, that counsel fees are not allowable as costs except in those special cases where the statute so provides. Ordinarily, if not always, the measure of damages for retaining money, or failing to pay a debt, is the interest thereon. What the creditor might have made by the use of the money in trade is purely a matter of speculation and can not be regarded.

It was held in *City of Pekin v. Reynolds*, 31 Ill. 529, that a city is not within the statute relating to interest, and is not liable for interest upon its contract unless by agreement. Whether the reasoning there would apply when interest is claimed because of unreasonable and vexatious delay of payment, or as a mode of fixing damages for tortious breach of duty, need not be considered.

As already stated, it is not fairly to be inferred from what is alleged that the defendant did more than to delay payment until its liability was established by law, nor that in this there was bad faith or any evil design. This is not "unreasonable and vexatious delay," within the statute (*Sammis v. Clark*, 13 Ill. 544), nor can it be regarded as a tort. Moreover, whatever was the right of plaintiff to interest it might have been recovered in the proceedings referred to as part and parcel of that demand, and no reason is perceived why he should be permitted to split his cause of action.

The demurrer was properly sustained. Affirmed.

A. M. Ridenhour v. Charles B. Atterbury.

1. **ERROR**—*Without Injury Not Ground For Reversal.*—It is not every error that will warrant a reversal, and when it is reasonably certain that no harm has resulted from an error there should be no interference by a court of appeal, on account of it; and in this respect each case must be judged by itself.

2. **INSTRUCTIONS**—*Should be Considered as a Series and as Applied to the Evidence.*—This court does not regard the instruction complained of as contradicting those given for appellant, but at the most as being merely ambiguous and so indefinite that, standing alone, it would probably mislead the jury. When taken in connection with the other instructions and applied to the evidence it is not so harmful as to warrant a reversal.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Montgomery County; the Hon. ALEX. W. HOPE, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

HOWETT & JETT, attorneys for appellant.

LANE & COOPER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff brought suit before a justice of the peace to recover the sum of seventy-five dollars which he claimed was due him from the defendant for the price of a "weigher," which was attached to a threshing machine.

The case was removed by appeal to the Circuit Court where on a trial by jury there was a verdict for defendant followed by a judgment against the plaintiff for cost. Hence the present appeal by the plaintiff.

The only question for the jury was whether the weigher was sold as a part of the threshing machine outfit, for which defendant was to pay \$1,350. The weigher was included in a chattel mortgage given on the outfit and was bought in by the plaintiff on foreclosure of the mortgage. The evidence was conflicting upon the stated question of fact, and the verdict ought to settle the dispute unless, as is argued

by appellant, the court gave erroneous instructions calculated to produce the result. It is urged that instruction number five for defendant is faulty in advising the jury that if the weigher "was an attachment to the threshing machine," and if the defendant purchased said threshing machine for \$1,350, and afterward paid said price, the verdict should be for defendant. The objection is that it was assumed if the weigher was an attachment to the machine it was sold and went with it.

It might be an attachment to and yet not a part of the machine, and not sold with it.

The instruction is erroneous, and should not have been given, because it contains the assumption suggested and is argumentative.

Perhaps the jury understood that if the weigher was an attachment merely it went with the machine, regardless of the proof that was offered as to the understanding and intention of the parties, but we can hardly think so. The whole issue before the jury was as to this very point. Did the plaintiff sell the weigher separate from or as a part of the machine?

All the evidence was directed to that issue.

The instructions for plaintiff, in different forms of expression, presented the point very fully and distinctly, and while the instruction referred to is faulty, yet it is not probable the jury were misled.

They could not, as reasonable men, suppose the court intended to say that if the weigher was merely attached to the machine the finding should be for defendant. It was so attached.

There was no dispute about that, but the issue all the way through was whether it was sold separately. Reading this instruction with those given for plaintiff, and the others given for defendant, the series may be regarded as sufficiently accurate. Had there been any confusion as to the issue of fact, such an inaccuracy might be regarded as more serious. As it is, we think the jury would understand the term "an attachment," to mean the same "as a part of," when they read the entire series. The issue was dis-

tinct and it was single. We do not think the conclusion would have been different if this error had not been committed. It is not every error that will warrant a reversal, and when it is reasonably certain that no harm has been done by such error, there should be no interference on that account. Each case must be judged by itself.

When instructions are contradictory upon a vital point in issue, it may be impossible to say which the jury accepted and followed. We do not regard this instruction as contradicting those given for plaintiff, but at the most as being merely ambiguous and so indefinite as that standing alone, it would probably mislead the jury, yet when taken in connection with the others and applied to the evidence, it is not so harmful as to warrant a reversal.

The judgment will be affirmed.

Henry D. O'Neil v. The People, for use of Anna W. Delano.

1. **JUDICIAL SALES—Disposition of Surplus Between Judgment Creditor and Purchaser at Prior Sale.**—A, being the owner of a tract of land, executed a mortgage to B, and thereafter C, D and E obtained judgments against A, which were liens on his land in the order named. C caused a sale to be made under his judgment, and there being no redemption, he obtained a deed at the end of fifteen months. B foreclosed his mortgage, and the owner of the equity of redemption failing to redeem, D, after twelve and within fifteen months from the foreclosure sale, deposited with the sheriff the amount necessary to redeem, and a sale was had, and a sum in excess of the claims of B and D, together with interest and costs, was realized. Prior to the latter sale, E sued out an execution on his judgment and placed it in the hands of the sheriff. *Held*, that E was entitled to have the surplus on said sale applied on his execution, and that C had no claim thereon.

Debt, on a sheriff's bond. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

A. N. YANCEY, D. E. KEEFE and PEEBLES & PEEBLES,
attorneys for appellant.

E. W. HAYES and RINAKER & RINAKER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action of debt on the bond of O'Neil as sheriff. The plaintiff recovered and the defendant, sheriff, has appealed. The plaintiff's demand was for a sum of money remaining in the hands of the sheriff, upon a sale made by him on proceedings in redemption under the statute. This sum, a surplus, was paid by the sheriff to James H. Belt who claimed it as the assignee of a judgment, disregarding the claim therefor made by the plaintiff. In March, 1888, one Jacob V. Hopper owning the real estate, which was the subject-matter of redemption, executed a mortgage thereon to one Hood.

On the 19th of January, 1893, the appellee Anna W. Delano filed in the office of the clerk of the Circuit Court transcripts of two judgments before a justice of the peace in her favor against said Hopper, thereby obtaining a lien upon the property subject to the mortgage. On the 20th of January, 1893, the Rumsey Manufacturing Company filed with said clerk a transcript of a judgment in its favor against Hopper before a justice of the peace, thereby obtaining a lien subject to the mortgage and subject to the judgments of appellee, Delano.

On the 22d of February, 1893, S. V. Luken obtained a judgment in the Circuit Court against Hopper, which was of course subject to the preceding liens. On May 27, 1893, the appellee Delano caused the property to be sold under executions issued upon her judgments. She became the purchaser for the amount due her with costs, and there having been no redemption from that sale within fifteen months, she received a sheriff's deed September 13, 1894.

At the June term, 1893, of the Circuit Court, the holders of the mortgage obtained a decree of foreclosure on a bill in chancery for that purpose, to which appellee Delano was not made a party, and on the 2d of August, 1893, the property was sold under that decree to the complainants therein

for the amount of the mortgage debt, interest and cost. On the 27th of October, 1894, being after twelve, and within fifteen months from the foreclosure sale, the Rumsey Manufacturing Company placed an execution upon its judgment in the hands of the sheriff with a sum of money sufficient to redeem from said foreclosure sale, and the sheriff having made proper indorsement of levy, etc., advertised the property for sale on the 24th of November, 1894.

On the last named day and before the sale said James H. Belt as the assignee of the Luken judgment caused an execution, issued thereon, to be placed in the hands of the sheriff.

At that sale the property was struck off to one Benner for \$3,005, which sum was sufficient to satisfy the Rumsey demand for judgment and redemption of the foreclosure sale, leaving a balance of \$489.60. This balance was claimed by Belt in part satisfaction of the Luken execution. It was also claimed by appellee Delano. The sheriff recognized Belt's claim and applied the money on said Luken execution.

Thereupon this suit was brought.

The issues having been made up were submitted to the court, a jury being waived, with the result as stated of a judgment for plaintiff for the amount claimed with interest and cost.

The question first to be considered is as to the relation sustained by the plaintiff to the property from the sale of which, in the redemption proceedings, the money in dispute was realized. She bought it at a sale under execution issued upon a judgment, which as a lien was junior to the mortgage, and thereby she acquired the mortgagor's equity of redemption, subject to the right of the mortgagor and junior judgment creditors to redeem from her. No such redemption having been made she received a sheriff's deed at the expiration of fifteen months from said sale.

After she had so bought, a decree was entered foreclosing the mortgage pursuant to the prayer of a bill in chancery for that purpose filed by the holders of the mortgage.

To that proceeding she was not made a party. Did that

decree affect her so that she was bound to redeem therefrom within twelve months from the day of sale thereunder? If it did, she lost all rights acquired under her sale.

In the cases of *McRoberts v. Conover*, 71 Ill. 524 and *Fitch v. Wetherbee*, 110 Ill. 475, the judgment creditor purchasing at a sale on execution made prior to the decree of foreclosure, the mortgage being the senior lien, was a party to the decree, and it was held that his failure to redeem from the mortgage sale within twelve months therefrom cut off and barred forever all his interest in the property.

If on the other hand the plaintiff was not affected by the decree and was not bound to redeem therefrom, then she acquired the property free from all liens except that of the mortgage, and still has the right to redeem therefrom upon a bill in chancery filed for such purpose. Plainly then in either case she was not affected by the redemption proceedings instituted under the judgment in favor of the Rumsey Manufacturing Company, and can not complain thereof, or claim benefit therefrom.

It is argued, however, that *Hart v. Wingart*, 83 Ill. 282, while not parallel in its facts announces a principle applicable here and supporting the position of appellee.

In that case an execution creditor bought real estate upon which there was a prior deed of trust by the execution debtor. After the twelve months and before fifteen had expired, the trustee sold the property pursuant to a power contained in the deed of trust for a sum in excess of the debt thereby secured, and upon a bill filed by the execution purchaser it was held, that by the sale under the deed of trust the land was converted into money, and that the claim of the execution purchaser was transferred and attached to the surplus fund to the extent of the amount due him. By his purchase he acquired the right to the property subject to the incumbrance, unless there was redemption from him.

He might pay at any time before a sale under the power contained in the deed of trust, from which sale indeed there could be no redemption, and the only effect of permitting the sale to take place was to convert the land into money,

and if no more money was realized than required to pay the debt secured by the deed of trust, his lien would have been defeated, as the court say, but if there was a surplus it would attach thereto.

By his purchase at the execution sale he acquired the interest of the debtor, and had the same right the debtor had in the surplus to the extent of his bid. The debtor would have been entitled to the entire surplus but for the lien of the judgment and the sale thereunder.

Here is a very different situation. The property was sold under a decree of foreclosure for the mortgage debt and cost, and those who were affected by the decree were bound to redeem therefrom within twelve months; those not so bound might redeem according to the practice in chancery upon a proper bill for that purpose. Here there is no surplus—which may be claimed by the mortgage debtor or by the holder of his equity of redemption. It was the disposition of such a surplus that was involved there. No other question was before the court. The case cited is so unlike the case at bar that we can not regard it as authority or as illustrating any principle that will support the present judgment. We are clearly of opinion that the plaintiff had no right to the money in dispute and that the judgment in her favor herein was erroneous.

It will therefore be reversed and the cause remanded.

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Edward J. Hughes v. Frank G. Noyes et al.

1. *DECREES—Supported by the Evidence.*—After an examination of all the testimony as contained in the abstract in this case, the court can not say that the conclusion reached by the chancellor who tried the cause is incorrect, and is rather inclined to think that it is supported by the better view of the testimony, and therefore conclude that the decree should be affirmed.

BILL, to set aside a deed. Appeal from the Circuit Court of Clark County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard

Hughes v. Noyes.

in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

GRAHAM & TIBBS, attorneys for appellant.

ROBERT E. HAMILL, attorney for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant filed his bill in chancery seeking to set aside as fraudulent a certain conveyance of real estate. He held a judgment against the grantors upon which there was an execution returned *nulla bona*, and it was averred that said conveyance was voluntary and for the purpose of putting the property beyond the reach of the appellant in any legal proceedings that he might institute to enforce payment of his demand.

The decree dismissed the bill and hence this appeal. Various questions are discussed in the briefs, but it is unnecessary to consider any except the principal issue as to the consideration of the conveyance.

If the testimony of the grantors and the grantee can be accepted as credible, the consideration was sufficient to support the conveyance. It must be conceded there are many circumstances which seem to impeach the transaction, and that perhaps a decree to that effect might be supported by the proof taken as a whole, yet after fully considering all that counsel have urged, and after an examination of all the testimony as contained in the abstract, we find it difficult to demonstrate that the conclusion reached by the chancellor is incorrect. We are rather inclined to think it is supported by the better view of the testimony, and have therefore concluded that the decree should be affirmed. Nothing is to be gained by a statement and discussion of the testimony. A faithful attempt in that direction would require more time and space than we think necessary to devote thereto; hence we merely state the result to which we have been led.

Decree affirmed.

**Almon G. Danforth and Henry Danforth v.
James L. Scott.**

1. *VERDICTS—Supported by the Evidence.*—According to the evidence offered on behalf of the plaintiff as to the value of his services, he earned enough within five years before suit brought to warrant the allowance made him by the jury, and, as it was a question of fact as to what the services were reasonably worth, and there was sufficient evidence to support the verdict, it must stand.

Assumpsit, for services as an agent. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

J. W. DOUGHERTY and EMERY ANDREWS, attorneys for appellants.

JAMES W. & EDWARD C. CRAIG and ISAAC B. CRAIG, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff sued defendant in assumpsit and recovered a verdict for \$614.24. After a motion for a new trial was denied, a judgment was rendered accordingly, from which the defendants have prosecuted this appeal. The claim of the plaintiff was for services as agent in looking after certain lands belonging to defendants, selling, renting, making improvements, etc.

That the plaintiff did render such services for a long time is not to be denied, but it is claimed there were payments, and that the statute of limitations barred the main part of the demand covered by this verdict.

According to the evidence offered on behalf of the plaintiff, his services were worth \$300 per annum, and, if so, he performed enough after the last payment, and within five years before suit brought, to warrant the allowance made him by the jury. It was a question of fact as to what the

Eberhardt v. Miller.

services were reasonably worth, and there was sufficient evidence to support the finding.

This view of the matter makes it unnecessary to consider whether the bar of the statute was removed by a promise to pay, a point much discussed in the brief of appellants.

Regardless of this, the proof sustains the plaintiff in his allegation as to the value of services rendered within the five years. We find no error in the admission of testimony, and there is no complaint as to the giving or refusing of instructions. The jury were amply instructed as to the law of limitations applicable, and there appears to be no good ground upon which we can interfere with the judgment.

It will therefore be affirmed.

Christian Eberhardt v. Benjamin S. Miller and Eli J. Gingrich.

1. *CONTRACTS—What Appears to be the Construction of the Parties, Adopted by the Court.*—A and B entered into a contract for the sale of real estate, by which A was to make a good and sufficient warranty deed by January 1, 1896, and furnish an abstract showing perfect title; and a forfeiture of \$1,000 was provided for in case either party should fail to comply with his agreement. The abstract when presented showed a tax deed, dated June 7, 1887, and a regular chain of conveyances from the grantee in that deed to A, and contained affidavits to the effect that the land had been in the peaceable and unquestioned possession of the grantee in the tax deed and his grantees from the date of said deed; that the original owner died before the tax sale, and that he left no minor heirs. The affidavits were not objected to until after suit was brought by B to recover the penalty of \$1,000 and an advance payment of \$200. *Held*, that the contract should be regarded as the parties seemed to regard it before and at the time fixed for its performance, and that B should not be permitted to object to the affidavits and compel a forfeiture because no sufficient abstract of title was offered.

Assumpsit, for a penalty. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

J. R. & WALTER EDEN, attorneys for appellant.

HARBAUGH & WHITAKER, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff below recovered a judgment against defendant for \$700 in *assumpsit*.

The declaration alleged a breach of contract in reference to the sale of land. It appears that the parties entered into a written agreement on the 13th of July, 1895, by which appellant agreed to sell to the appellees 160 acres of land for \$13,600, of which \$200 was then paid in cash; \$3,800 was to be paid January 1, 1896, and the balance in deferred payments extending through a period of some six years. Appellant was to make a good and sufficient warranty deed with abstract showing perfect title, the deed to be made on or before January 1, 1896.

It was provided that, "in failure of either of the parties to this contract to fulfill this agreement for this contract, to forfeit to the other the sum of one thousand dollars."

The plaintiff claimed the right to recover the \$200 advance payment, and \$1,000, the forfeit mentioned, because defendant failed to furnish an abstract showing perfect title.

The parties met on the 1st of January, 1896. The defendant presented a deed for the land in due form, and had a considerable time before presented his abstract—the plaintiffs presented the notes for the deferred payments, and had there, ready to pay over, the sum of \$3,800 then due under the contract, but did not permit the defendant to count it.

The objection made by plaintiffs was that the abstract did not show a perfect title for the west eighty-acre tract of land under contract. The abstract showed an entry of this tract in May, 1853, by Augustus Daniels, a sale for taxes and a sheriff's deed thereunder, the deed bearing date June 7, 1867, and a regular chain of conveyances from the grantee in that deed to the defendant.

There was also an affidavit signed and sworn to by one Joel Kenny to the effect that the land had been in the open, peaceable and unquestioned possession of said grantee and his grantees from the date of said tax deed down to the date of the affidavit September 28, 1895, a period of over twenty-eight years, and there was also the affidavit of the defendant, dated January 1, 1896, showing that he had been in actual possession under claim of title by deed since March 1, 1887, and had paid all taxes during that period.

There was also an affidavit of one Grizzard, showing that the patentee, Daniels, died intestate in the State of North Carolina some time during the year 1860, leaving no widow or children nor any minor heirs, and that he had a brother Julius Daniels, who died in 1863, leaving a widow but no children or minor heirs. It seems that the objection taken to the abstract when presented some time previously, and again at the meeting January 1, 1896, was that there was no quit-claim deed from the widow of Julius Daniels, and that defendant had made some effort to obtain such a deed, but the widow, who lived in North Carolina, having changed her residence, it required more trouble and expense than was thought necessary, and it was given up. It is urged on behalf of plaintiff (appellees here) that the sheriff's tax deed was insufficient to convey title because there was no proof of the necessary preliminary steps to show a valid sale. No argument in opposition to this position is made in behalf of defendant (appellant here), and we do not feel called upon to determine whether an abstract to show a perfect title should be accompanied by such proofs. It is further urged on behalf of appellees that the affidavits referred to are no part of an abstract and can not be regarded as such. One difficulty is to say what is meant by the term "abstract of title," as used in this contract.

Very few titles are perfect in and of the record. Where there is a change of ownership by operation of law consequent upon the death of the owner intestate, it is necessary to prove by parol upon whom the title is cast, and where title is based in whole or in part upon the operation of the

statutes of limitation, parol proof is necessary with reference to possession and the like. We suppose it is the usual practice in making abstracts of title to manifest such facts by the affidavits of persons cognizant thereof, and while such affidavits are not legal proof of the matters therein set forth they are usually accepted as sufficient for the purpose. So we find that when the parties were discussing this abstract no objection was made to the affidavits as a part of it, but the point was that a quit-claim deed should have been obtained from the widow of Julius Daniels, and it was contended that the title would be satisfactory with such deed. It was also objected at the meeting on January 1st that the affidavits did not show but Daniels might have had other brothers who might have left minor heirs.

It is true the affidavit of Grizzard did not in terms say that Julius was the only heir of Augustus Daniels, though such is the fair inference and such no doubt was the understanding of the appellant.

Now taking these affidavits as a part of the abstract, as the parties did, reasonable construction thereof leads to the conclusion that when the possession under tax title began there were no persons interested in the land by reason of their relation to the title of the patentee who were under disability through infancy or coverture, or indeed from any cause, and that a title by possession for twenty years matured within a short time after appellant purchased the land, and in addition that the appellants had a good title by reason of possession under his deed, and payment of taxes more than seven years when he entered into the agreement declared on.

The specific objection urged that there was no deed from the widow seems wholly without force, for upon the facts deducible or inferable from the affidavits, she had no claim that she could have enforced as against the appellant.

The appellees should not be permitted now to ignore these affidavits and thereby compel a forfeiture of one thousand dollars, because no sufficient abstract of title was offered. The matter should be regarded as the parties then before, seemed to regard it.

Whether the sum named should be considered as a penalty merely, or as liquidated damages under the rule announced in *Gobble v. Linder*, 76 Ill. 157, and other cases in this State, need not now be discussed. But be it the one or the other, we think appellees were in no condition to demand it on the facts as disclosed—nor were they at liberty to withdraw from the contract and require a return of the payment of \$200, which they had advanced. We are impressed with the view that their action at the meeting of January 1, 1896, was not in good faith, and that they were actuated more by a purpose to obtain an unfair advantage over the appellant than to secure a perfect title.

It is difficult to see upon what basis the damages were assessed. The sum advanced, \$200, was no doubt allowed, but upon what theory the rest was determined is not apparent.

If the sum named in the contract was liquidated damages, then plaintiffs were entitled to the whole of it. If it was a penalty, then the allowance should have been restricted to the damages sustained, as to which there was no proof aside from the item of \$200.

We think the judgment is not in accordance with the rights of the parties and that it should be reversed and the cause remanded.

Silas S. Whitehead v. E. D. Jones, Adm'r.

1. **JUDGMENT**—*When it May Exceed Amount Indorsed on Summons.*—A transcript from a justice of the peace showed the amount sued for, and that the defendant entered his appearance and waived service. *Held*, that under these circumstances the summons was wholly unimportant, and the fact that the judgment was for an amount in excess of the demand indorsed on the summons did not render it erroneous.

2. **ATTORNEYS**—*Must Pay Money Collected to Person for Whom it Was Received.*—A person who receives money as the attorney of an administrator can not set up as a defense, when sued therefor, that the money should go to the heirs, but must pay it over to the administrator, in whom the legal title vests upon the payment to the attorney.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Clark County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

S. S. WHITEHEAD, appellant, *pro se*.

NEWTON TIBBS, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This case was brought before a justice of the peace and removed by appeal to the Circuit Court, where the plaintiff recovered a verdict and judgment for \$91.15, from which defendant has appealed to this court.

A formal objection is that the demand indorsed on the summons was \$70.38 and that the judgment is for a larger sum.

The transcript of the justice shows that the demand sued for was \$91.15, and that the defendant waived service and entered his appearance. This dispensed with the summons and was in effect an appearance to a demand for the amount stated \$91.15. For some reason plaintiff afterward asked leave to amend his claim to show demand \$91.15. The transcript then reads "motion allowed and claim amended so as to show \$90.15." Evidently by a slip of the pen or some oversight the amount was made too small by one dollar.

No further notice of the matter appears until after the verdict was rendered in the Circuit Court when the plaintiff moved to amend summons "so as to insert amount \$91.15," and defendant moved for a new trial. One of the grounds of the latter motion was that the verdict was in excess of the amount indorsed on the summons.

It does not appear that the court ruled specifically on the plaintiff's motion to amend, but the motion for new trial was overruled, which may be regarded as in effect including leave to make the amendment. But, as suggested, the entry by the defendant of his appearance and waiving service to a demand for \$91.15 rendered the summons wholly unimportant, indeed superfluous, and it is immate-

rial whether the subsequent motions to amend were effectual or not. In any view of the matter, the judgment ought not to be reversed for this cause.

The claim made by the plaintiff was for money collected by the defendant as an attorney at law.

It appears that the defendant had been employed by said Nancy Craig to foreclose a mortgage held by her against one Harris. There were complications not necessary to be stated which prolonged the proceedings, pending which the said Nancy Craig died intestate, and the plaintiff Jones was appointed her administrator, and as such was made complainant in her stead. The husband and heirs at law of said Nancy were also made parties. After some further delay the case was adjusted by the payment of five hundred dollars, of which the sum of two hundred dollars was paid to the heirs at law of said Nancy, and three hundred to her administrator, the plaintiff, the last named sum being actually received by the defendant as the attorney of the administrator.

It is to recover a balance of this sum remaining in the hands of the defendant, and not accounted for, that this suit was brought. The defendant held the view that the administrator had no right to receive the money, but that it should be paid directly by the defendant to the distributees of the said Nancy Craig. It is unnecessary to state in detail the line of argument on which this contention is based, but, in substance, it seems to be that it was so understood when the compromise was made, and indeed, as stated, two hundred dollars was then paid to the heirs at law.

Just why this was done is not very clear, but be that as it may, the residue, three hundred dollars, was in fact paid to the defendant for the administrator, and the defendant signed a receipt therefor accordingly, as the attorney of the administrator.

Whether there was any indebtedness of the estate to which this money was applicable need not be ascertained. The legal title thereto was in the administrator, and the legal duty rested upon him to collect and account for it in

the proper way. It seems that defendant, acting upon his view of the matter, had paid a part of it to the distributees and was entitled to retain his fees for legal services, and that the amount recovered here was the balance after giving him credit for such payment and for his fees. It was his duty to pay to the plaintiff as such administrator, and upon the facts as shown by the record, the judgment was necessarily for the plaintiff.

The action of the court in giving and refusing instructions and in denying the motion for new trial and rendering judgment on the verdict, upon this theory as to the legal rights of the parties, was correct. The judgment will be affirmed.

John P. Perisho v. Leander Perisho.

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895	614

1. JUDGMENTS—*Irregularities in Obtaining—Who May Complain.*—A filed a bill against B to subject certain funds in his hands to the payment of a judgment against C. The judgment was founded on a note, payable one day after date, accompanied by a power of attorney authorizing a confession "at any time after this note becomes due." The judgment was entered before the expiration of the days of grace. *Held*, that the debtor only should be allowed to object on that account, and that as the debt was *bona fide*, the mere fact that judgment was entered prematurely, could not be set up by B, when he was not prejudiced thereby.

2. APPELLATE COURT PRACTICE—*As to Objections Presented for the First Time.*—It is a matter of common practice in courts of appellate jurisdiction to decline the consideration of questions not presented on the trial. And in this case, as the objection to the affidavit, proving the execution of the power of attorney to confess judgment was not interposed in the trial court, this court declines to consider it.

3. FRAUDULENT CONVEYANCES—*Not Set Aside at the Request of a Participant in the Fraud.*—When parties enter into an arrangement for the conveyance of the real estate of one of them, for the purpose of hindering and delaying his creditors, at the same time, reserving a secret trust for the benefit of the grantor, according to well-settled principle, the law will leave them in the position they make for themselves, and will not set the conveyance aside at the request of a creditor who was a party to the arrangement.

4. ESTOPPEL—*By Decree on Same Question.*—A filed a creditor's bill

Perisho v. Perisho.

against B, C and D, praying that land to which B held the legal title be subjected to the payment of a debt due from C; and in pursuance of such bill a decree was entered declaring that B was the lawful owner of the land in question, and that C's creditors had no claim thereon. At a subsequent date D filed a creditor's bill against B and C, to subject the same land to sale for the payment of a claim against C. *Held*, that the decree in the first suit estopped D from setting up the claim relied on in the second, as he was a party to the first, and as it involved the same question as that at issue in the second.

Creditor's Bill.—Appeal from the Circuit Court of Edgar County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

JAMES A. EADS, F. W. DUNDAS and H. S. TANNER, attorneys for appellant.

JOSEPH E. DYAS and ROBERT E. HAMILL, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree subjecting certain funds in the hands of appellant to the payment of a judgment held by appellee against one Wm. H. Perisho. It is urged as a ground of reversal that the judgment is void because it was prematurely entered, and because there was no sufficient affidavit proving the execution of the power of attorney to confess, the judgment being by confession, in vacation.

The note was dated January 3, 1893, payable one day after date and was accompanied by a power of attorney authorizing a confession "at any time after this note becomes due." The judgment was confessed on the 4th of January, and the contention is that the note was not due because the days of grace had not elapsed and so the confession was without authority, and void. We are inclined to hold that this objection is one which the debtor only should be allowed to urge. There is no collusion or fraud of which the appellant may complain. The debt was *bona fide*, and the mere fact that the judgment was entered prematurely

should not be set up by the appellant when he is not prejudiced thereby.

The objection as to the affidavit is that the signature of the clerk to the jurat is wanting.

It does not appear that this objection was interposed when the judgment was put in evidence.

It is a matter of common practice in courts of appellate jurisdiction to decline the consideration of questions not presented on the trial. Had the objection to the affidavit been stated then, it is probable it might have been obviated. If the affidavit was in fact made, the oath being duly administered, the mere failure of the clerk to attach his signature to the jurat should not vitiate the proceeding *Kruse v. Wilson*, 79 Ill. 233. Had the objection that the judgment was premature been made on the trial, and had it been clear that the defect was fatal, the complainant might have dismissed his bill without prejudice for the purpose of taking a valid judgment without delay upon which to obtain an execution and afterward file a new bill to reach the fund in dispute. The course pursued by appellant of making no specific objections upon the hearing and holding the points in reserve until the case is argued here should not be approved.

On the question whether the appellant should be charged with a fund in his hands derived from a surplus arising on the sale of lands formerly belonging to the judgment debtor and held by the appellant in trust, the evidence is conflicting.

In the case of *Perisho v. Quinn*, 52 Ill. App. 102, we affirmed a decree involving the same question of fact. That decree was put in evidence in this case and it is contended it is conclusive upon appellant. The appellant contends it is not because the appellee was not a party to the decree, and not himself being bound by it is in no condition to urge it as binding upon appellant who was a party thereto. The general rule is as stated by the appellant though not always followed or recognized by the courts of this county—but we need not determine whether it is applicable here because

we find enough independent and original proof of the facts, if believed by the trial court, to support the present decree so far as that feature of the case is concerned.

Appellant urges that this case differs in its proof from the Quinn case, because there no question was made as to the validity of the debt or the judgment thereon, and because here the appellee was a party to the fraudulent conveyance and can not be heard to make his present demand as to the fund held by the appellant; that he is estopped by his participation in the transaction to allege the real facts. We have in effect disposed of the first of these objections. As to the second, there is proof that while appellee was present on the occasion when Wm. H. Perisho made the conveyance of his land to Jonathan Perisho, who afterward conveyed to appellant upon the same understanding with which it was conveyed to him, yet appellee was not permitted to know the facts, and that the real object of the transaction was concealed from him because they distrusted his ability to keep the secret. It is said there is no proof that the appellee did actually know of the fraudulent purpose for which the deed was made, nor that he had anything to do with that particular transaction whatever he may be presumed to know or suspect as to such purpose. It is said the evidence does not connect him with the fraudulent transaction as a party, and he is not estopped to assert the facts and ask the relief prayed for in his bill.

This is the insistence of counsel for appellee. All the circumstances of the transaction are to be considered, and it should be noticed that appellee though present at the trial and though it was proved that he had repeatedly said he had no interest in the matter, and that the suit was carried on wholly at the instance of W. H. Perisho, did not testify and gave no evidence whatever in his own behalf. It seems incredible that he did not understand the purpose of the conveyance to Jonathan, and while he was not a party to that conveyance, he was to several others made that night, all of which were parts of a general scheme to put the property of all these insolvents out of the reach of creditors,

and to protect each other in respect to their personal liabilities as sureties or otherwise.

Appellee was then surety for W. H. Perisho, and according to the testimony of the latter it was the purpose to secure that claim out of the surplus so as to protect appellee and Mrs. Perisho, the mother, who was also on the paper assurety. The ultimate result of the decree is to relieve W. H. Perisho of his liability to appellee, and to Mrs. Perisho in case she should be compelled to respond as co-surety to appellee. It appears that this suit is really prosecuted by W. H. Perisho rather than by appellee, and the effect is to enable him as a direct, and appellee as an indirect participant, presumably cognizant of the whole matter, to benefit by the decree, when, according to a well settled principle, the law will leave the parties in the position they have made for themselves.

As a part of the general transaction, when Wm. H. Perisho deeded the land in question to Jonathan Perisho, he deeded his undivided interest in the land on which his mother had a right of dower to appellee, for the expressed consideration of seven hundred dollars, and at the same time appellee conveyed this and other lands to his brother-in-law, M. C. Cook, for the expressed consideration of \$1,450. The purchase money for this land represented by the note of Cook, was used by appellee to pay the note to the bank, on which he and his mother were surety for W. H. Perisho, which payment is the basis of appellee's claim as creditor of said W. H. Perisho, in this case. This part of the transaction connects appellee directly and as a beneficiary with the fraudulent conveyance to Jonathan Perisho, and in addition seems to show that to the extent of \$700, the purchase price of the undivided interest in the dower property, he was then indemnified against his contingent liability as surety of W. H. Perisho.

Another aspect of the case should be stated here. The deed, intended to put the land of W. H. Perisho out of the reach of his creditors, was made to Jonathan Perisho, to whom W. H. Perisho owed five hundred dollars, which it was understood should be secured by this conveyance.

Jonathan, in case he should sell the land, was to pay the various incumbrances thereon, retain said five hundred dollars, and hold the surplus for the benefit of W. H. Perisho.

At that time W. H. Perisho was indebted to appellant in a considerable amount, some twelve hundred dollars or more, absolutely or contingently, appellant being his surety for a part of the amount, and when the transaction came to the knowledge of the appellant, he wanted security as to these matters. He went to Jonathan Perisho and to W. H. Perisho, and after some discussion it was agreed that if the appellant would undertake, at all events, to pay the five hundred dollars due to Jonathan Perisho, the latter should convey the land to him, and when he should sell it he might retain what was due or should become due him from W. H. Perisho in addition to the five hundred dollars due Jonathan.

It appears that the amount so paid Jonathan, and the amount really due appellant, and the amount he has had to pay Quinn, almost, if not quite, equals the surplus received by appellant over and above the incumbrances on the land. As between appellant and W. H. Perisho the balance is small if anything. As between him and appellee it would seem the latter should be required to explain or account for the item of \$700, being the purchase price of the interest of W. H. Perisho in the dower property.

The state of the account between appellant and W. H. Perisho is not important unless the transaction is to be regarded as fraudulent as against creditors, and appellee is to be treated as a creditor, innocent of the fraudulent transaction. But as shown already, it is difficult, if not impossible, to so regard him in the light of all the facts and circumstances, and in view of his failure to testify.

Another important feature of this record is, that in a chancery proceeding brought by Griswold and other creditors (not including Quinn) against Wm. H. Perisho, John P. Perisho (appellant) and Leander Perisho (appellee), determined at the September term, 1888, of the Edgar Circuit

Court it was adjudged that the appellant was the lawful owner of the lands in question, and that the creditors of W. H. Perisho had no claim against appellant in that behalf.

In that case W. H. Perisho appeared and testified in support of said transaction, affirming its validity, and denying that it involved any fraudulent reservation as against creditors. Appellee was a party to that suit which also involved the conveyance by him to Cook, and the transfer of the notes representing the purchase money to the bank in satisfaction of the indebtedness of said W. H. Perisho, on which appellee and their mother were sureties, being the same matter which is the basis of the present claim of appellee as a creditor. A part of said decree directed that said Cook notes should be a lien upon the land conveyed to him, and that on payment of the same to the bank, the said claim of the latter should be satisfied pursuant to a recited agreement of the parties to that effect. Now it is urged in behalf of appellant that this decree should estop appellee to set up the present claim against the validity of said transfer.

The answer made by appellee to this insistence is that as appears by the receipt of the attorney for the bank the payment to the bank was subsequent to the decree, and it is said the appellee could not be estopped to assert a claim which has arisen to him since the rendition of said decree. The contingent liability existed long before that suit was commenced, and as already stated, the decree involved the payment by appellee by means of the transfer of the Cook notes of said indebtedness.

It was one of the findings of the decree that the appellee had some time previously transferred said notes for that purpose, and that the bank was willing to accept the same, and the transaction was approved and confirmed by the decree. So the position of appellee is not sustained by the facts, and we are at a loss to see upon what line of reasoning appellee can avoid the estoppel of said decree.

He was a party thereto. It involved the very question at issue now, and it also affected and settled his liability for, and provided for his payment of, the very indebtedness upon which is predicated his present claim as creditor.

Seltzer v. Saxton.

The mere fact that such claim remained unadjusted for some four years up to the time when the judgment note was taken, is not important except as it appears to corroborate the suggestion that the proceeding is based upon an afterthought conceived by W. H. Perisho, who now undertakes, by his own testimony, to impeach a transaction which in that case he testified was fair and honest.

We are of opinion the decree should be reversed and the cause remanded.

John D. Seltzer v. William A. Saxton.

1. **NEGLIGENCE—*Accidentally Discharging a Pistol.***—In an action on the case it was shown that a child, some six years of age, was playing in front of defendant's place of business, and causing some annoyance by climbing on the bars in front of the window and making childish noises, when, to frighten him, the defendant flourished a pistol, pointing it in his direction and accidentally discharged it, the bullet entering the child's face just below the right eye. *Held*, that the act was grossly negligent, and that the fact that there was no intention to do an injury was no defense.

2. **MEASURE OF DAMAGE—*In Suit by a Father Based on an Injury to His Child.***—In a suit by a father for damages resulting from injuries to his child, the plaintiff, if he makes out his case, is entitled to recover a reasonable sum for actual loss sustained, and to be sustained, by reason of defendant's act, to be made up of the expense and trouble of caring for the child, and the deprivation of his services during minority. There is, of course, no fixed measure of damages in such a case, the allowance resting in the sound discretion of the jury, and in this case, the court thinks that discretion was not abused.

3. **EVIDENCE—*Exhibition of Articles Connected with an Injury.***—In an action on the case by a father to recover damages resulting from an injury to his child, caused by the discharge of a pistol, a physician who operated on the child was permitted to exhibit to the jury an eye, which was removed as a result of the injury, the bullet inflicting the injury, and a piece of bone which was detached in extracting the bullet. *Held*, that there was no impropriety in permitting the jury to see these physical evidences of the injury, and that it is not to be presumed that such exhibition prevented them from reaching a reasonable and dispassionate conclusion.

4. **AGENCY—*Not Shown in this Case.***—Evidence of an agreement on

behalf of plaintiff not to prosecute this suit in consideration of the settlement of another suit, was properly rejected for the reason that the plaintiff could not be prejudiced by such an agreement unless made by authority from him, which was not involved in the offered proof.

5. *INSTRUCTIONS—Faults in, May be Cured by Other Instructions.*—Although an instruction is indefinite, and therefore faulty, if it is accompanied by another instruction which distinctly states the principle involved, the fault will be cured, and error can not be assigned on account thereof.

6. *SAME—Should Relate to Matters in Evidence.*—Instructions should relate to matters in evidence, and while a proposition involved in a proposed instruction is correct abstractly, yet unless there be some occasion for it under the evidence it may properly be refused.

7. *SAME—Proposed Instruction Held Properly Refused.*—A declaration contained seven counts in which the case was variously stated, and instructions were given in which the jury were told specifically what the plaintiff was required to prove in order to make out a case. *Held*, that an instruction that plaintiff must prove every material allegation in his declaration, was properly refused as tending to confuse and mislead.

Trespass on the Case, by a father for damage resulting from an injury to his son. Appeal from the Circuit Court of Douglas County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

JOHN J. REA and THOMAS W. ROBERTS, attorneys for appellant.

As we understand the law governing cases of this character, the rule is: "That a person is not liable for an unintentional injury resulting from a lawful act, where neither negligence nor folly is imputable to him who does the act. And the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff. *Paxton v. Boyer*, 67 Ill. 132; *Morris v. Platt*, 32 Conn. 75; *Brown v. Kendall*, 6 Cushing, 292; *Robertson v. State*, 2 Lea (Tenn.) 239.

"Only pecuniary damages can be recovered in such actions as this. Nothing can be given as a solace or for bereavement suffered." *City of Chicago v. Hesing*, Adm'r, 83 Ill. 204; *City of Chicago v. Major*, 18 Ill. 349.

"In case a minor child is injured, the parents can not recover for the injury as such; that right belongs to the child. But the father can recover for the loss to himself

caused by the injury, which will be measured by the loss of the child's services during minority, and by the expenses of the illness caused by the injury. *Cuming v. Brooklyn C. R. Co.*, 109 N. Y. 95; *American and English Encyclopedia of Law*, Vol. 17, page 385, and cases therein cited.

An attorney is an officer of the court in which he practices, and acts under his oath of office. And where he appears for a party, the law presumes he has the right to do so, until the contrary appears. *Reed v. Curry*, 35 Ill. 536; *Williams v. Butler*, 35 Ill. 544; *Harris v. Galbraith*, 43 Ill. 309; *Ransom v. Jones*, 1 Scam. 291; *People v. Quick*, 92 Ill. 580.

LEFORGEE & LEE and J. M. NEWMAN, attorneys for appellee.

To constitute an available defense in cases of the same nature as the case at bar, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation, in any degree, of fault to the defendant. *Atchison v. Dullam*, 16 Brad. 42; *Underwood v. Hewson*, 1 Strange, 596; *Tally v. Ayres*, 3 Sneed, 677; *Chataigne v. Bergeron*, 10 La. Ann. 699; *Morgan v. Cox*, 22 Mo. 373.

The fact of an alleged agency can not be proved by the unaided declaration of the alleged agent, not brought home to the principal. *Maxey v. Heckethorn*, 44 Ill. 437; *Whiteside v. Margarel*, 51 Ill. 507; *Thayer v. Meeker*, 86 Ill. 470; *Proctor v. Tows*, 115 Ill. 138; *Heustis v. Kennedy*, 23 Ill. App. 42; *Osgood v. Pacey*, 23 Ill. App. 116.

Negligence may be presumed where an injury has resulted through the acts and conduct of defendant. *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486; *North Chicago St. R. Co. v. Cotton*, 41 Ill. App. 311.

The verdict of \$2,900 is not excessive. *Texas & N. O. Railway Co. v. Wood*, 24 Southwestern Reporter, 569; *Dollars v. Roberts*, 29 Northwestern Reporter, 104; *Maurerman v. St. Louis, I. M. & S. Ry. Co.*, 41 Missouri App. 348.

What the life of one is worth, in a pecuniary sense, is a question incapable in its nature of exact determination. How this pecuniary damage is measured and what shall be the amount, must be left largely to the discretion of the jury. *City of Chicago v. Hesing, Adm'r*, 83 Ill. 207; *Chicago & A. R. R. Co. v. Shannon*, 43 Ill. 338.

In a suit by a parent for loss of services, the parent may recover for time spent in caring for and nursing the child. *Connell v. Putnam*, 58 New Hampshire, 534.

When a parent sues for an injury to a minor son, the measure of damages is the present value of his future earnings during minority, less the cost of maintenance, and the expense of sickness. *A. & E. Enc. of Law*, Vol. 17, page 390.

Is \$2,900 excessive? *A. & E. Enc. of Law*, Vol. 17, page 390, and cases cited; *Houston, etc., Ry. Co. v. Miller*, 49 Texas, 322; *Chicago, B. & Q. R. R. Co. v. Warner*, 108 Ill. 538; *Anglo-American Packing & Provision Co. v. Baier*, 31 Ill. App. 653; *Atchison, T. & S. F. R. R. Co. v. Elder*, 50 Ill. App. 278.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff below recovered a verdict and judgment against defendant for \$2,900, from which the latter has prosecuted this appeal.

The cause of action was an injury to the infant son of plaintiff, whereby the plaintiff had been and would be deprived of the services of the son, and had been and would be put to great expense and trouble in taking care of him during his minority. The injury complained of was by the careless and negligent discharge of a pistol at the child, which resulted in the loss and removal of the right eye and a condition of blindness, almost if not quite total, of the left.

The shooting was according to the proof a most negligent and indefensible act, done not intentionally as claimed, and probably so, and that the defendant should be held responsible therefor seems too clear for argument.

The child, then some six years of age, was playing in

front of the defendant's place of business, and was causing some annoyance to the defendant and his clerk by climbing on the bars in front of the window and making childish noises, when, to frighten him, the defendant flourished a pistol, pointing it in that direction, and accidentally discharged it, the bullet entering the face just below the right eye, with the ultimate consequences already stated. That there was no intention to do an injury under such circumstances is no defense.

The act was grossly negligent and the defendant is liable.

It is urged the damages are excessive.

The plaintiff was entitled to recover a reasonable sum for actual loss sustained and to be sustained by reason of the defendant's act.

This actual loss would be made up of expense and trouble in caring for the child and the deprivation of his services during minority. Great expense and trouble have already been incurred, and if the present condition of the left eye should continue, as according to the medical testimony is probable, the child will be a very serious burden hereafter. It is difficult to estimate just what this item may amount to in a pecuniary sense. The loss of service will be total.

There is, of course, no fixed measure of damages in such a case, and the allowance must rest in the sound discretion of the jury. We think that discretion was not abused here.

The sum assessed is not unreasonable in view of the great burden cast upon the plaintiff by the permanent affliction of the child, to which must be added the loss of services during minority.

It is urged on behalf of appellant that the jury were led to their assessment of damages by the admission of improper and irrelevant testimony in regard to a conversation between the plaintiff and defendant, when the former applied for a loan of \$100 to enable him to take the child to an oculist. The defendant declined to make the loan and advised the plaintiff not to incur the expense.

For some time after the injury it was not supposed by the plaintiff's local physician that even the right eye was

permanently affected. The external wound was very slight, and it was thought it might be due wholly to broken pieces of glass which were extracted, but as time passed the eye did not improve and seemed to be sightless, and the left eye, appearing to be affected sympathetically, the plaintiff was advised to consult a specialist. He was unable to raise the money for that purpose without considerable effort, and as it seemed, later, valuable time was lost in this way.

The admission of the proof referred to is justified by counsel for the purpose of showing that plaintiff was reasonably diligent, under the circumstances, and that the defendant discouraged and to some extent delayed the visit to the specialist. We can not say the evidence complained of was wholly irrelevant—nor do we think it improperly affected the jury in the assessment of damages.

Another item of proof which it is urged was irrelevant and calculated to enhance the damages, was a part of the testimony of the specialist who removed the right eye and also the bullet which was found imbedded in the skull just back of the eye. The particular objection is that the witness was permitted to exhibit the eye and the bullet so removed, and a piece of the bone which was detached in extracting the bullet. It was a material part of the plaintiff's case to show that the condition of the left eye was caused by the injury to the right, and that the bullet did penetrate the flesh as alleged, and lodged where it was found. It was competent to show this by the result of the operation and the opinion of the surgeon. There was no impropriety in permitting the jury to see these physical evidences of an important and controverted fact, and is not to be presumed that such exhibition would deprive them of the capacity of reaching a reasonable and dispassionate conclusion.

It is further insisted the trial court erred in refusing proof that the plaintiff had waived his right of action against defendant, in consideration of the withdrawal by defendant of a motion for new trial in a case brought against him by the child. It was not shown or proposed to show that the

plaintiff was a party to the suggested arrangement, but merely that the attorney of the child had volunteered the statement that if the defendant would pay the amount of the verdict in that case, the defendant would not be sued by the present plaintiff.

The evidence was properly rejected for the reason that the plaintiff could not be prejudiced by such statement of the attorney, unless made by authority from him, which was not involved in the offered proof.

It is urged the sixth instruction given for plaintiff was erroneous, because it did "not limit the time of care and service to be recovered for to the minority of the boy."

The instruction is indefinite in this respect, and is therefore faulty, but it is supplemented and cured by the sixth instruction given for defendant, which distinctly states the limitation.

It is argued that the court erred in refusing the sixth refused instruction asked by defendant, to the effect that the jury could not go outside of the evidence to make up their verdict, and that if the finding was for the plaintiff the amount allowed must be confined to the pecuniary loss.

The admonition contained in the first sentence of this instruction was gratuitous. There was no occasion to go outside of the evidence, nor, in view of the proof, can we suppose the jury did so in finding for the plaintiff. Indeed we do not see how, on the evidence, they could have found against him. The rest of the instruction, relating to the measure of damages, was but a repetition of what was contained in the fourth and sixth, which were given at defendant's request.

The seventh refused was to the effect that if the boy could see out of his left eye, and that if any witness had knowingly sworn falsely as to the sight of said eye for the purpose of increasing the damages, then the jury might disregard the testimony of such witness unless corroborated, etc.

On reading the evidence we find no occasion for this instruction. While the proposition involved is correct

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abstractly, yet, unless there was some occasion for it, there was no error in refusing it. Had it been given we can not believe the verdict would have been different. The eighth refused was to the effect that the plaintiff must prove every material allegation in his declaration. There were seven counts in the declaration, in which the case was variously stated. In the instructions already given the jury had been told specifically what the plaintiff was required to prove in order to make out a case.

This instruction would have tended to confuse and mislead, and therefore was properly refused.

As already stated we think the verdict was abundantly justified by the evidence, and we find the law applicable was given with sufficient clearness and fully enough.

It would not comport with justice to reverse the judgment on any of the alleged errors.

Judgment affirmed.

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f92	1446
f92	1448

Eugene Holt Eastman v. People, etc., for Use of the State Board of Health.

1. **MEDICINE AND SURGERY**—*Recovery Against Osteopathist for Practicing Medicine Without a License Sustained.*—The appellant was engaged in the practice of "the profession of osteopathy," and the State Board of Health brought suit against him for practicing medicine without a license, and obtained a judgment for the statutory penalty. *Held*, that the proofs brought him within the provisions of the law, and that he is liable to the penalty imposed thereby for practicing medicine without a license.

2. **PRACTICE**—*As to Motions to Dismiss for Want of Authority of Plaintiff's Attorney.*—A motion to dismiss a suit for want of authority of plaintiff's attorney to institute it, should be supported by affidavit or some matter of which the court should take notice, and must be preserved in a bill of exceptions if insisted on, on appeal.

Debt, for a penalty. Appeal from the County Court of Jersey County; the Hon. ALLEN M. SLATEN, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

HAMILTON & HAMILTON and THOS. F. FERNS, attorneys for appellant.

A statute should be so construed as not to lead to absurd consequences, but its spirit and intent effectuated. *Perry County v. Jefferson County*, 94 Ill. 220; *People v. Hoffman*, 97 Ill. 236; *Hogg v. People*, 15 Ill. App. 289.

A statute in regard to medicine and surgery does not apply to one who undertakes to cure diseases by manipulating the patient's body by rubbing, kneading and pressing it. *Am. and Eng. Encyclopedia of Law*, Vol. 18, 429 (note); *Anderson's Law Dictionary*, 668; *Smith v. Lane*, 24 Hun (N. Y.) 632.

The title of the act under which this action is brought, is: "An act to regulate the practice of medicine in the State of Illinois." Under our construction this title can not be so construed as to include those practicing osteopathy.

If so, then we contend that any provision in this act which has not a tendency to promote the object and purpose of the said act, is clearly obnoxious to the constitutional provision that, "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." *Sec. 13, Const. Ill.* 1870; *People v. Institution of P. D.*, 71 Ill. 229; *Dolese v. Pierce*, 124 Ill. 140; *Donnersberger v. Prendergast*, 128 Ill. 229.

The trial court erred in denying the motion of appellant, to compel attorneys for appellee to produce their authority for representing the beneficial plaintiff below, when their authority was challenged by motion. *Town of Kankakee v. Kankakee & I. R. R. Co.*, 115 Ill. 88.

E. J. VAUGHN and H. W. POGUE, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for one hundred dollars as a penalty for practicing medicine without license, under *Par. 10, Ch. 91, R. S.* It appears that the appellant was engaged in the practice of "the profession of osteopathy," as it is termed in the briefs; that he had an office where he

received patients, and that he visited patients at their homes; that he advertised his system and his skill therein by publications in the newspapers, and that he professed ability to understand and treat human ailments intelligently and successfully.

So far as shown his treatment consisted wholly of rubbing and manipulating the affected parts with his hands and fingers, and by flexing and moving the limbs of the patient in various ways.

It is insisted on his behalf that because he used no medicines or instruments he is not amenable to the statute.

Par. 14, of Ch. 91, declares that "Any person shall be regarded as practicing medicine within the meaning of this act who shall treat, operate on, or prescribe for any physical ailment of another."

It is argued on behalf of appellant that this provision must receive reasonable interpretation, and that to "treat" implies the use of medicines or drugs of some sort, and to "operate on" implies the use of instruments of some sort. This is not so necessarily. Many of the minor operations are effected without the use of instruments by mere pressure, extension, and flexion.

This of course implies some knowledge of anatomy and some skill. So, many forms of disease are treated by attention to the diet, habits and mode of life without resorting to medical remedies.

It is said by counsel that if the statute reaches this case it must include treatment by Turkish baths, massage and the like. We think not. The evidence shows that appellant held himself out as competent to treat and cure numerous diseases, such as all forms of fevers, cerebro-spinal meningitis, catarrh; diphtheria, croup, pneumonia, asthma, indigestion, dysentery, kidney diseases, measles, paralysis, and many others, including in fact a large proportion of the ailments common to mankind. He represented himself as a graduate of the new school of "Osteopathy," and held himself out as qualified to examine and treat all who might seek his aid.

Herein, he differs from those who give Turkish baths, massage and the like.

He professes to be able to diagnose and advise in respect to a long list of diseases, and to furnish discriminating and efficient treatment to those who may come to him, and while he may rely wholly upon manipulation, flexing, rubbing, extension, etc., yet he professes to have skill and judgment in these methods, so as properly to adapt the treatment to each case, giving it what is appropriate, in amount, and with repetition at such times and to such extent as may be dictated by his knowledge and experience. By his skill in the use of his peculiar remedies or methods he claims to be competent to relieve and cure various ailments, and therefore he invites patronage. We are referred to the case, *Smith v. Lane*, 24 Hun, 632. The statute of New York is unlike ours, and the facts of that case are unlike those in the case at bar. We think the ruling there should not control here.

It is suggested rather than argued that as the title of the act in question is "An act to regulate the practice of medicine in the State of Illinois," and as the constitution provides that no act shall embrace more than one subject which must be expressed in the title, any construction which would include a matter not within the practice of medicine must be avoided, or the act is unconstitutional.

"Medicine is the art of understanding diseases and curing or relieving them when possible."—Bigelow. It is that branch of physic which relates to the healing of diseases.—Dunglison.

This act is not restricted to any particular methods or remedies. Indeed these are almost innumerable, considering what are used and what have been discarded.

We are of opinion the proofs bring appellant within the act, and that he is liable to the penalty imposed thereby for practicing medicine without license.

It is urged the court erred in refusing to dismiss the suit for want of authority of plaintiff's attorney to institute the action.

It is shown by a recital of the clerk in the order of record

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that such a motion was made and overruled and that the defendant excepted.

This entry by the clerk in the orders of the court for the day is not sufficient to save the exception, and if it were, there is nothing to show that the motion was supported by anything requiring the action of the court. Such a motion should be supported by affidavit or some matter of which the court should take notice and must be preserved by a bill of exceptions.

The judgment will be affirmed.

Michigan Stove Company v. Harwood Hardware Company et al.

1. *AGENCY—Authority Secured Through Fraud.*—The court holds that the testimony in this case clearly shows that certain of the appellees, aided by an attorney, induced the appellant to intrust to the attorney its interests in the matter out of which this suit arose; that the attorney, though assuming to act for the appellant, was in fact acting in behalf of said appellees; that the appellant repudiated the acts of this attorney in due season; and hence that it is not bound by anything he did in the matter, and that appellees can not avail themselves of his ostensible authority in defense of this action.

Assumpsit, on three promissory notes. Appeal from the Circuit Court of McLean County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

A. E. DEMANGE and RALPH F. POTTER, attorneys for appellant.

J. J. MORRISSEY, attorney for appellees, K. B. Harwood and Grace Rogers-Harwood.

OPINION PER CURIAM.

The action below was *assumpsit*, brought by the appellant company to recover on three notes given to it by the Harwood Hardware Co., K. B. Harwood and Grace

Rogers-Harwood, the Hardware Company being the primary debtor.

K. B. Harwood, when the notes were executed, was president and owner of all the stock of the Hardware Company, and Grace Rogers-Harwood was his wife.

Harwood sold the assets and property of the Hardware Company (except accounts due to it) to one Taylor, and the defense to the notes in suit was that Taylor afterward executed to the appellant company a chattel mortgage to secure the payment of the notes, and that the appellant company failed, through its own negligence, to realize payment of the notes out of the mortgaged property, and also wrongfully deprived the appellees, K. B. and Grace Rogers-Harwood, of an opportunity to have the mortgaged chattel property appropriated to the payment of the indebtedness evidenced by the notes.

We have carefully read the testimony, and without entering upon a recitation of unpleasant details, deem it sufficient to say it clearly appeared K. B. Harwood, acting in behalf of himself and his wife, aided by a young and inexperienced attorney, induced the appellant company to intrust its interest in the matter to said attorney, who, though assuming to act for the appellant company, was in fact acting in behalf of the said K. B. and Grace Rogers-Harwood.

Under the advice of this attorney, the appellant company was led to permit him to take certain steps with relation to the chattel mortgage, and a sale of the property under it, whereby, as appellees now claim, the appellant company became the owner of a portion of the mortgaged property, in part satisfaction of the amount due on the notes given by appellees, K. B. and Grace Rogers-Harwood.

The company, in due season, repudiated the acts of this attorney, and in our opinion the Circuit Court should have ruled it was not bound or concluded by anything he did in the matter, and that the appellees could not avail themselves of his ostensible authority to represent it in defense of the action upon the notes.

In justice to counsel who appears for appellees in this court, it is proper we should here remark he is not the attorney referred to hereinbefore, and there is nothing in his connection with the case inconsistent with the fair and proper discharge of his duty as an attorney and counsellor at law.

The judgment must be and is reversed and the cause remanded.

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**John W. Rhodes and The Stoddard Mfg. Co., Impleaded
with The Havana Press Drill Company, v. John
L. Ashurst and Lewis B. Ashurst.**

1. *SET-OFF—Against an Assignee of a Patent.*—In a suit for an accounting, by the assignee of a patent, against persons manufacturing under a former assignment alleged to have expired, the allowance of a claim against the original owner of the patent as a set-off, is held proper under the circumstances.

2. *PATENTS—Royalties for Articles Made, but Not Sold.*—The court holds that the royalties claimed in this suit, for the use of the patent in making the articles remaining unsold, were properly left unadjusted by the court. Had the patent been used piratically a different rule might have been applied, but, under the circumstances of this case, it was proper to let an accounting for the use of the patent await a sale of the articles.

3. *ACCOUNTING—Before a Master in Chancery.*—In taking an account, a master in chancery is not limited to the date of entering the decree; he can extend it down to the time of the hearing before him.

Bill, for an accounting. Appeal from the Circuit Court of Mason County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

JOHN G. MANAHAN and CHARLES M. PECK, attorneys for appellants.

JOHN W. PITMAN, attorney for appellees.

Rhodes v. Ashurst.

OPINION PER CURIAM.

This cause was before us at a former term, 48 Ill. App. 454.

An appeal from our decision was affirmed by the Supreme Court, with directions to the Circuit Court to cause an apportionment to be made upon equitable principles of the royalties properly chargeable for the use of the complainant's patent. 148 Ill. 115.

In pursuance of such directions the Circuit Court ordered the master in chancery to make and state an account of all the royalties and license fees which ought to be paid by said J. W. Rhodes and the said Stoddard Manufacturing Company, or either of them, to said Lewis B. Ashurst, and of all proper credits and all set-offs thereto, if any, and that he report the same with the evidence taken and his conclusions at the next term.

The master performed the duties thus enjoined upon him, and to his report exceptions were filed by the respective litigants.

The Circuit Court heard the exceptions and rendered a decree finding the total amount of royalties to be apportioned to be \$22,243.50, of which the sum of \$3,748 had been paid by the Stoddard Manufacturing Company to said John W. Rhodes, leaving unpaid by the Stoddard Manufacturing Company the sum of \$18,495.50, and that said Rhodes was entitled to a set-off in the sum of \$6,326.15 as against said Lewis B. Ashurst, such set-off being the amount due said Rhodes from said John L. Ashurst upon certain notes given by the latter to the Havana Press Drill Co.

The decree further found Lewis B. Ashurst entitled to recover from the said Rhodes and said Stoddard Manufacturing Company one-half the sum, to wit, \$18,495.50, found to be unpaid upon said royalties, to wit, \$9,247.75, and that said Lewis B. Ashurst was entitled to recover from said Rhodes one-half the amount, to wit, \$3,748 received by said Rhodes from said royalties, to wit, the sum of \$1,874, after deducting from such sums the amount due Rhodes by way of set-off, to wit, \$6,326.15.

The amount to be paid said Lewis B. Ashurst under the

terms of the decree was \$4,795.60, for which sum a decree was rendered in his favor against said John L. Rhodes and the Stoddard Manufacturing Company to be enforced by execution.

Both parties appealed to this court.

The parties respectively complain of the conclusion arrived at by the court as to the proper amount to be accounted for as royalties for the use of the Ashurst patent.

The amount to be paid by the Stoddard Manufacturing Company to Rhodes, under the contract between them, was readily ascertained, but this sum was for the use and value of a number of different patents, including that held by Ashurst.

The relative value of these different patents was the subject of much testimony, and its solution is attended with no little difficulty.

The testimony consists mainly of that of different witnesses as to the respective merits of the different patents and estimates as to the value contributed by each to the total value of a complete drill, which was the result of the combined employment of all the inventions covered by the different patents.

Such evidence consisted largely of the conflicting opinions of witnesses as to the relative benefit conferred by the different patents to the working and saleable quality of the drills, and lacked so many elements of exactness as to make a satisfactory solution quite difficult.

We have examined the testimony, considered the rather voluminous arguments presented thereon, and have arrived at the conclusion there is sufficient evidence in the record to support the finding of the court upon the question.

To incorporate in this opinion the testimony in detail and our reasoning thereon, would extend it unreasonably without corresponding benefit to the litigants or to the profession.

The allowance to Rhodes of the sum of \$6,326.15 by way of set-off was proper as we think.

The amount so set off was the sum due from John L. Ashurst on certain notes given by him to the Havana Press

Drill Co., and the consideration grew out of the assignment of the patent in question by said John L. to the Havana Press Drill Co., and the business of making and selling the drills by the company under the assignment.

John L. afterward assigned the same patent to Lewis Ashurst, but subject to all right inuring to the Havana Press Drill Co. by virtue of the former assignment.

Rhodes and John L. owned the stock of the Drill Co., and the amount set off is only such portion of the indebtedness evidenced by the notes as his stock interest entitled him to have in the assets of the company.

The interest acquired by Lewis in the patents was qualified by the former assignment, and as the decree divested the Havana Drill Co. of all interest in the patent and left Lewis the sole owner thereof, it was proper to adjust by set-off the matter of the notes.

The royalties claimed for the use of the patent in the 107 drills remaining unsold were properly left unadjusted by the court.

The Stoddard Manufacturing Company made these drills under a contract with Rhodes which authorized the use of the Ashurst patent as the result of the assignment by the inventor of his patent to Rhodes.

Had the patent been used piratically a different rule might have been applied, but, under the circumstances of this case, it was proper to let an accounting for the use of the patents await sale of these drills.

The contention the accounting should have been limited to the date of the decree is not well founded.

It was proper to receive testimony and adjust the account down to the time of the hearing before the master.

Curtis on Patents, 4th Ed., Sec. 436; *Rubber Co. v. Good-year*, 9 Wall. 788.

We think the decree should be affirmed.

**People, etc., ex rel. P. S. Replogle, v. The Julia F.
Burnham Hospital.**

P. S. Replogle v. Same.

1. **CORPORATIONS—Power of Directors to Adopt By-laws.**—Where the petition upon which letters of incorporation are issued commit to a board of directors the management and control of a hospital to be maintained by the corporation, and no restrictions on the power of the board appear, they must be deemed empowered to adopt any regulation for the government of the hospital which is reasonable and consistent with the general purposes of the corporation.

2. **SAME—A By-law Held Reasonable and Within the Power of the Directors.**—The board of directors of an incorporated hospital adopted a by-law reciting that certain medical societies had adopted codes of medical ethics as nearly identical as possible and uniform in scope and arrangement, and providing that only physicians who comply with the codes of such associations should practice in the hospital. *Held*, that the by-law was reasonable and within the power of the directors to adopt.

3. **CHARITIES—Who May Complain as to Management of.**—A physician, whose only interest in the government of a hospital is the hope of gains and profits to arise from the practice of his profession therein is not a beneficiary of the trust, and has no standing in a court of law or equity to complain that the government of the hospital is such as to deprive him of profit that he might receive if other rules or modes were adopted for the management of the charity.

Mandamus and Bill for Relief.—Appeals from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

J. L. RAY, attorney for appellant.

GERE & PHILBRICK and WOLFE & SAVAGE, attorneys for appellee.

OPINION PER CURIAM.

The first of these cases was a bill in chancery filed by the appellant, alleging that he was a physician and surgeon regularly licensed under the laws of the State to practice his

The People v. The Julia F. Burnham Hospital.

profession, and that the directors of the appellee hospital had refused to admit him to practice in the hospital, and praying the court should by its decree order the directors to permit him to visit and treat professionally patients in the hospital.

The second case was a petition for a writ of mandamus, to require the directors to admit the petitioner to practice as a physician in the hospital.

The court upon a hearing held the appellant was not entitled to the relief prayed in either form of proceeding, and petitioner has appealed.

It appeared upon the hearing a large majority of the regularly licensed practicing physicians in the city and county of Champaign, wherein the hospital is located, regarded the appellant as guilty of unprofessional and discreditable conduct in the practice of medicine and surgery, and notified the directors they would not send patients to, or practice their profession in the hospital if appellant was admitted to treat patients there.

The board of directors thereupon adopted the following by-law:

"Section 1. The American Medical Association, the American Institute of Homeopathy, the Illinois Homeopathic Medical Association, and the State Electric Medical and Surgical Society, and the Illinois State Medical Society, have adopted a code of medical ethics as nearly identical as possible and uniform in scope and arrangement. Only those physicians who comply with the code of these associations may practice in the hospital."

The codes of professional ethics adopted by the various associations and societies named in the by-laws do not differ in substance.

The code of the American Medical Association is as follows:

4. It is derogatory to the dignity of the profession to resort to public advertisements or private cards or hand-bills, inviting the attention of individuals affected with any particular disease, publicly offering advice and medicine to

the poor gratis, and promising radical cures, or publishing cases and operations in the daily prints, or suffering such publications to be made; to invite laymen to be present at operations; to boast of cures and remedies; to adduce certificates of skill and success, or other similar acts. These are the ordinary practice of empirics, and are highly reprehensible in the regular physician.

The rule is stated by the American Institute of Homeopathy as follows :

3. Physicians should not resort to public advertising or private cards or handbills inviting the attention of persons affected by a particular disease, or publicly offer advice or medicine to the poor gratis, or promise radical cures, or publish cures or operations in the daily prints, or invite laymen to be present at operations or solicit or exhibit certificates of skill and success.

4. Equally derogatory to professional character to hold a patent for any nostrum or surgical instrument, or keep secret the nature or composition of medicine used by him.

It appeared from the proofs, appellant, in order to obtain patronage, resorted to public advertising, and printed handbills or circulars wherein he promised radical and wonderful cures, and boasted of his superior medical knowledge, skill and success; invited persons affected with diseases to employ him; set forth certificates showing that extraordinary success attended his treatment in many different cases, and proffered to examine patients and give medical advice without charge. It appeared also that in many instances he exacted notes from his patients in advance of rendering service to them, and in such notes inserted a clause to the effect that the consideration of the instrument was for the "wages of a laborer." It appeared also the appellant, in the newspapers and by way of circulars, advertised as an incorporated "Medical and Surgical Institute and Sanitarium," having a president and secretary, when in fact there was no such corporate company.

These practices and devices of the appellant were in flagrant disregard of the standard of professional conduct

adopted by the association and societies of the learned and honorable profession of which he was a member, and are regarded by the great body of physicians and surgeons as unprofessional and discreditable, if not disreputable.

The false assumption of corporate existence, with the powers and paid privileges resulting from a corporation for the purpose of soliciting business, is a positive violation of the criminal statutes of the State, and is punishable by the infliction of a fine.

Criminal Code, Sec. 220.

For such reasons the greater number of physicians and surgeons in the city and county wherein the hospital was located, as a mark of their condemnation of the conduct of appellant, and with the view of purging their ranks of the presence of one who had no regard for the dignity or standing of their honorable calling, determined they would not recognize him as worthy of association of reputable practitioners.

They so notified the directors of the hospital, and the directors were confronted with the question whether the sick and afflicted in their care, or who should come to the institution for relief, should have the benefit of the attention, experience, skill and learning of the great body of physicians and surgeons, or be committed wholly to the hands of the appellant.

The hospital had its existence for the purposes of extending relief to the sick and afflicted and of relieving their pain and suffering

The appellee hospital is a corporation organized under the general laws of the State. The petition upon which letters of incorporation were issued committed the management and control of the hospital to the board of directors, and we find nothing in the record restrictive of the powers of the board. They therefore must be deemed empowered to adopt any regulation for the government of the hospital which is reasonable and consistent with the general purposes of the corporation.

We think it was fully within their power to adopt the

by-law in question and to enforce it. Under the by-law the appellant, in order to obtain admission to the hospital as a physician, had but to abandon practices which the common judgment of his professional brethren branded as discreditable, and which are so commonly resorted to by quacks and charlatans.

The requirement of the by-law was reasonable and within the power of the directors to adopt, and we think entirely right and proper.

The decree complained of may also be upheld from other considerations.

The contention does not involve any property right belonging to the trust, but only a question of the proper exercise of the governing power of the directors.

Only those who have an interest in the government of the trust are entitled to involve the directors in litigation because of alleged misgovernment. The appellant was not a contributor to the fund by which the hospital was established; nor has he contributed to provide a fund to maintain it. The beneficiaries of the hospital are those unfortunates for whose relief and comfort it was established.

A physician, whose only interest in the government of the hospital is the hope of gains and profits to arise from the practice of his profession therein, is not a beneficiary of the trust, and has no standing in a court of law or equity to complain that the government is such that he does not profit from its existence, as he might if other rules or modes were adopted for the management of the charity. 27 American & Eng. Ency. of Law 278.

The decree and the judgment must be and are affirmed.

Niagara Shoe Company v. William W. Tobey.

1. CORPORATIONS—*Reduction of Capital Stock of, Must be Pro Rata.*
—The court holds that the statute authorizing a reduction of the capital stock of a corporation requires that equality between the several stockholders should be preserved, and that to accomplish such a reduction

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with equality it must be made pro rata, as no other method would be fair or equitable, and therefore permissible, except by consent of those to be affected.

Assumpsit, on a subscription to the stock of a corporation. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

LAWRENCE & LAWRENCE and WM. A. YOUNG, attorneys for appellant.

KIMBROUGH & MEEKS, and CALHOUN & STEELY, attorneys for appellee.

OPINION PER CURIAM.

Appellant brought assumpsit to recover of appellee \$3,000 upon his subscription for thirty shares of the capital stock of said company.

The second special plea of defendant was as follows:

And for a further plea in this behalf, the defendant says that the plaintiff ought not further to have or maintain its aforesaid action against him, the defendant, because, he says, that after the making of the alleged subscription to the capital stock of plaintiff corporation, and after the alleged complete organization of the said corporation, and after the commencement of this suit, on, to wit, May 5, A. D. 1896, and without the consent, knowledge or sanction of this defendant, the capital stock of said corporation was, at a special meeting of the stockholders thereof, held for that purpose, two-thirds of the alleged stockholders therein voting in favor thereof, reduced to the sum of, to wit, \$54,200, and that said capital stock was so reduced by releasing therefrom the subscription thereto of George W. Abdill, as trustee to the amount of, to wit, \$45,800, and not by a pro rata reduction from the subscription of each and all of the subscribers to the capital stock of said corporation, as required by law; and defendant avers that no reduction was made from his subscription to the capital

stock of said corporation, and that such reduction of the capital stock and release from the subscription of the said George W. Abdill, as trustee, was to the injury of, and was made without the consent, knowledge or sanction of this defendant, whereby, and by means of the premises, the equality existing and intended to exist between the shareholders in said corporation was destroyed, and this defendant became and was released as a subscriber to the capital stock of said corporation, and his said subscription thereto became and was null and void, and this defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to further have or maintain its aforesaid action against him, this defendant, etc.

To this plea the plaintiff filed a replication as follows:

And for replication to the second special plea by the defendant above pleaded, the plaintiff says *precludi non*, because, it says, that the defendant, as well as all other stockholders of said plaintiff, had knowledge and notice of said meeting of said stockholders to reduce the capital stock of said corporation, as in said plea mentioned, in this, that a notice properly addressed to defendant, signed by a majority of the directors of said corporation, stating the time and place of meeting and the object thereof, that is to say, for the purpose of reducing the capital stock of said corporation, as provided by the statute in such cases, was given the said defendant by depositing the same in an envelope, postage prepaid, in the postoffice at Danville, Illinois, being the postoffice address of defendant, at least thirty days prior to said meeting, and also by publishing a like notice for three successive weeks next before said meeting, in a newspaper published in the city of Danville, in said Vermillion county, being the county in which the principal business office of said corporation was then located, and ever since has been located, and this plaintiff is ready to verify, etc.

The court sustained a demurrer to this replication and gave judgment against the plaintiff for cost. The record is brought here on the appeal of the plaintiff, and error is

assigned upon the action of the court in sustaining the demurrers to said replication.

The defense set up by the plea was as to the mode by which the reduction of the capital stock was effected, that is, by releasing the subscription of Abdill as trustee to the amount stated, no reduction whatever being made on the subscription of other stockholders, which was really a release of Abdill's subscription, rather than a reduction of the capital stock of the corporation in the proper sense of the term.

We are inclined to agree with the position that the statute when it authorizes a reduction of capital stock, intends that the equality between the several stockholders should be preserved, and to accomplish the reduction with such equality it must be made pro rata. No other method would be fair or equitable, and no other would therefore be permissible except by consent of those to be affected.

The replication does not answer the defense interposed by the plea.

The meeting may have been called regularly, and every stockholder may have had due notice. It was the irregular action of the stockholders that is complained of, not an irregularity in their convocation.

It does not aid their illegal action to aver that they were duly convened.

The replication was not good and the demurrer thereto was properly sustained.

Judgment affirmed.

Solon Banfill v. Martha A. Twyman et al.

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172 123

1. **REAL ESTATE—*Certain Articles Held Not Part of.***—The court holds in this case, that whatever was or would have been the status of the property in controversy but for the intervention of the legal proceedings stated in the opinion, there resulted a severance of it from the realty by virtue of the action of those who were administering upon the estate of the insolvent corporation to whom the property belonged, and by the clearly implied assent and acquiescence of the parties themselves.

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Banfill v. Twyman.

Trespass on the Case, for injury to real estate, with count in trespass. Appeal from the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

SOLON BANFILL and W. W. MELOAN, attorneys for appellant.

BAILY & HOLLY, H. C. AGNEW and SHERMAN & TUNNICLIFFS, attorneys for appellees.

OPINION PER CURIAM.

Appellant brought his action against the appellees to recover damages for having despoiled and wasted certain real estate by removing therefrom certain lumber, timber, brick, window and door frames, window and door sills, a lot of sand, lime and mortar, fifty tramway cars, a lot of tramway iron, one engine, one sewer pipe press, one pug mill, a lot of structural iron, etc., which property so removed was, as alleged, appurtenant to the real estate mentioned in the declaration as belonging to the plaintiff.

The issue presented by a plea of not guilty was submitted to the court without a jury, upon evidence adduced by the respective parties, and the finding was for the defendants. Judgment followed accordingly and the plaintiff has appealed.

The Bardolph Fire Clay Works, a corporation, owned the land, some five or six acres, upon which was a building or structure with the machinery therein constituting its plant. This plant, or factory, was destroyed by fire in 1892, and the company undertook to rebuild. For that purpose it purchased brick and other materials and placed the same on the premises, but before much progress in rebuilding had been made, it became so embarrassed financially that operations were suspended. On the 23d of August, 1893, the Hutmacher Brick Company filed its claim for a lien for brick furnished to be used in rebuilding, and after this action was taken it seems that nothing further was done in the way of rebuilding, as the company was, and for some time before had been, insolvent.

The petition of the Hutmacher Brick Company was prosecuted to a decree at the May term, 1894, of the Circuit Court, when an order of sale was entered for the sum of \$317.67 due the petitioner, and for \$100 due another petitioner, the St. Louis Refrigerator and Wooden Gutter Company, whose claim was filed in October, 1893. On the 23d of March, 1894, all the property in controversy, being the said building materials and certain machinery and the like saved from the fire, was sold by the sheriff under an execution issued upon a judgment in favor of defendant Twyman against the Bardolph Fire Clay Works for \$1,912.15 obtained at the February term, 1894, of the Circuit Court.

The defendants, Sherman and Tunnicliff, became the purchasers at that sale and have since removed and appropriated most of the property they so purchased.

On the 30th of June, 1894, the master in chancery sold the real estate in question to satisfy the decree in the lien proceedings and the Hutmacher Brick Company purchased at the price of \$383.94. The master issued a certificate of purchase in usual form, which was assigned to the plaintiff herein on the 29th of June, 1895, and the premises not having been redeemed, the master executed a deed to the plaintiff on the 2d of October, 1895. The plaintiff claimed that the building materials having been purchased by the owner of the land for the purpose of rebuilding the plant thereby were constructively annexed to the land and passed with it, so that the master's sale and deed invested him with the ownership of these materials as well as the soil.

These articles are personal and chattel in their nature, and unless affixed to the soil, actually or constructively, did not pass at the sale of the real estate by the master, and did pass by virtue of the sheriff's sale.

We shall not enter into a discussion of the subject of fixtures, nor attempt to state even in a general way the considerations which are applicable in ascertaining whether chattels have been annexed to realty, or whether after such annexation they have been severed or detached therefrom so as to resume their original character.

It is said to be a matter of intention of the owner of the soil, and in a controversy between vendor and vendee, it is often a question of the mutual intention of the parties where there is anything to show such mutuality of intention.

It may be assumed that where one brings a quantity of material on his land for the purpose of building a permanent structure, there is, constructively, an annexation of the chattels to the realty and that were the owner to sell the land while matters are in that stage the buyer would take the whole. In this case there was such intention to annex but the purpose was not carried out.

It was prevented by the financial inability of the owner and the action of creditors. The building operations were suspended and owing to the situation could not be and were not resumed.

The law stepped in to administer its relief between the debtor and the creditors and appropriated the property of the former to the use of the latter. By separate proceedings it sold the land to one and the building materials, etc., to another. These sales were made under such circumstances as to indicate very clearly that it was understood by the respective creditors, as well as by the officers conducting the sales, that the chattels, if they had ever been annexed to the soil, were then treated and regarded as severed therefrom. The sheriff's sale, made some three months before the master's sale, was not objected to by the lien petitioners though certainly they were aware of it. No effort was made to interfere with it. Their acquiescence is clearly inferable.

Afterward they took their decree, and still later purchased the realty at the master's sale. The plaintiff knew all this. He knew that the defendants had purchased the severed personalty and in repeated interviews he recognized the validity of what had been so done.

He even sought to purchase the property from the defendants Sherman and Tunnicliff, the purpose stated being to form a new company which should acquire all the effects and resume the operations of the old.

Subsequently he bought the certificate of purchase from

Davis v. Herbert.

the Hutmacher Brick Co., and, taking a master's deed, asserted ownership of the property in dispute.

Our conclusion is that whatever was or would have been the status of the property but for the intervention of the legal proceedings stated, there resulted a severance of it from the realty by virtue of the action of those who were administering upon the estate of the insolvent corporation, and by the clearly implied assent and acquiescence of the parties themselves.

In view of these facts it would be manifestly unjust to permit the plaintiff to recover upon a theoretical or constructive annexation when he and those under whom he claims by their conduct as well as by their express declarations conceded a severance. Neither he nor they supposed or understood that the property in dispute passed at the master's sale. They did not object to but acquiesced in the proceedings by which the sheriff sold it severed from the soil.

The officers of the law, standing in the place of the owner of the land and of the property in dispute treated the latter as not pertaining to the former, and it was so regarded by the respective purchasers.

We are of opinion that the plaintiff had no cause of action and that the conclusion of the trial court was correct.

The view thus expressed renders it unnecessary to consider the points raised by the appellant as to the action of the court in disposing of the demurrer to the declaration.

The judgment will be affirmed.

Jerome Davis v. Oliver Herbert.

1. *DRAINAGE—Effect of Abandonment of Part of a Ditch.*—A ditch throughout its entire length, should be considered as one ditch, and the abandonment of material portions of it before the expiration of the twenty years necessary to give a right to its use by prescription, operates to prevent the completion of that right as to other parts of the ditch.

Trespass on the Case, for filling a ditch. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

MILLS BROS., attorneys for appellant.

W. C. JOHNS, attorney for appellee.

OPINION PER CURIAM.

Appellant and appellee owned adjoining tracts of land.

Appellee constructed a dam in a ditch which led across both tracts and thereby, as appellant alleged, obstructed the flow of the water and caused it to stand upon and destroy his crops.

He brought this action to recover damages caused as he alleged by the water thus caused to remain upon his lands.

He was defeated and has appealed to this court.

The lands of appellee were in general conformation lower than that of appellant, but there was no water-course or general depression in it into which water collected by appellant upon his land could be discharged in greater quantity than it would otherwise have flowed.

But appellant's contention was that a ditch had been dug in the land of appellee and maintained there for more than twenty years, and that during that period of time by consent of the owners of appellee's tract, the appellant and the former owners of his tract had, in the course of good husbandry, collected the water falling or being upon their lands and discharged it into that ditch in greater quantity than otherwise would have flowed in that particular place, and the claim of the appellant was that he obtained an easement by prescription to continue to so discharge the waters from his tract.

It appeared, however, that the ditch upon the tract owned by appellee was part of a continuous line of ditch which passed partly through appellant's tract, through the lands of the appellee, and thence north through other tracts until a water-course was reached into which the waters were

emptied, and that some years before the expiration of the term of twenty years the owners of the lands north of appellee's premises had filled up that part of the ditch in their respective properties, and that the ditch, treated as a continuous line—one improvement—had not existed for a period of twenty years.

The position of the appellant was that the ditch so far as it extended across appellee's land had existed there for twenty years and that an easement accrued in his favor to have perpetual use of that part of the ditch on the land of appellee.

The Circuit Court did not accept this view of the case but held, and rightly, as we think, that the ditch throughout its entire length should be considered as one ditch, and that the abandonment of material portions of it before the expiration of the twenty years operated to prevent the completion of the prescriptive right sought to be availed of by the appellant..

Hence it followed the appellee had lawful right to close up the ditch upon his land, which, when done, left the respective tracts subject to action of natural laws so far as the matter of the drainage of the water upon them was concerned.

The ditch was constructed by parol mutual license of the various persons interested at the time of its construction and at the respective dates when certain of the licensees filled up the parts of the ditch upon their respective premises. Such licenses were revocable at the pleasure of the licensor.

The act of the legislature, approved June 4, 1889 (S. & C. Statutes, 3d Vol., page 475), abrogated this common law right of revocation or restricted it, but previous to its enactment, and during the periods of time here involved, the common law right of revocation was the rule.

We think the trial court properly held the appellee had the right to close up that portion of the ditch which was upon his premises, and that the appellant had no right of action against him.

The judgment is affirmed.

J, Park McGee v. Sarah C. Coffey, Adm'x.

1. **VERDICTS**—*Ignoring Facts Established by the Evidence.*—In this case there was evidence sufficient to make out a defense which the jury appear to have disregarded. It is not a case of conflicting testimony, but rather a case where certain evidence has been ignored, wholly without good reason, and the verdict should not be allowed to stand.

Assumpsit, on the common counts. Appeal from the Circuit Court of Douglas County; the Hon. EDWARD P. VALE, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

JAMES W. & EDWARD C. CRAIG, E. L. WALKER and THOMAS W. ROBERTS, attorneys for appellant.

J. MARTIN NEWMAN and ECKHART & MOORE, attorneys for appellee.

OPINION PER CURIAM.

This is an appeal from a judgment in favor of the appellee as administratrix for \$1,750. The claim of the plaintiff was based upon various transactions between defendant and the intestate running through a period of eighteen years, including board, money collected by the defendant for the intestate, etc. The evidence tended to show a balance due upon such items with more or less certainty. The defendant proved by several witnesses that the intestate stated not long before her death and after all the supposed items accrued that she and defendant had settled and that there was nothing due her from him. It seems she held his promissory notes for about \$340, which he paid to the administratrix. It does not appear, however, when these notes were given.

This testimony as to her admissions of a settlement is practically not contradicted.

There was an attempt to impeach the general reputation of two of the witnesses. How far this was successful need

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not be discussed, but however much so, there is unimpeached testimony of other witnesses equally as direct to the same effect. We have no doubt she did make such admissions, and from the proof before us we are forced to the conclusion that she did not regard the defendant as her debtor except as to the notes which she held against him.

The fact that she held these notes, in view of what is proved as to the numerous transactions between them during such a long period, is quite persuasive that they had such an understanding in regard to their business affairs.

The jury disregarded this aspect of the case, and, so far as we can see, wholly without good reason. It is not a case of conflicting testimony, but rather a case where the evidence, *prima facie* sufficient to make out a defense, has been ignored. We think the issue should be again tried. The judgment will therefore be reversed and the cause remanded.

Chicago & Kansas City Coal Co. v. August Nelson.

1. VERDICTS—*On Conflicting Evidence.*—The evidence in this case is conflicting, and the verdict should be accepted as final, in view of the fact that there is enough on behalf of the plaintiff, if believed, to sustain it.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Menard County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

N. W. BRANSON and T. W. McNEELY, attorneys for appellant.

H. W. MASTERS and CHARLES NUSBAUM, attorneys for appellee.

OPINION PER CURIAM.

This is an appeal for a judgment for \$500 in an action on

the case. The declaration averred that the plaintiff was working as a coal miner for defendant, and as such employe was necessarily let down the shaft of the coal mine in a cage, which was lowered by means of certain apparatus and machinery operated by an engineer in the employ of defendant; that said engineer was careless and unskillful; and that by reason of the carelessness and incompetence of said engineer, the cage upon which plaintiff was being let down the shaft was suffered to descend too rapidly, whereby plaintiff was seriously injured. It was also averred that the defendant was negligent in employing and in retaining the engineer. The proof tended sufficiently to show that plaintiff was injured, as alleged, by the negligence of the engineer, and there was considerable proof tending to show that the engineer was negligent and careless in the performance of his duty, so frequently as to attract attention and cause unfavorable comment. It was proved also that notice of this matter was brought to the superintendent of the defendant company.

The superintendent denied that he had such notice, or any reason to doubt the fitness of the engineer. On this point the evidence is conflicting, and the verdict should be accepted as final, in view of the fact that there is enough on behalf of the plaintiff, if believed, to sustain the conclusion.

There is evidence also that the reputation of the engineer was bad, and a little more inquiry than was made by the officers of the defendant company probably would have apprised them of it.

Perhaps they made as much inquiry as is usual in such cases, and if the negligence of defendant rested alone upon what they did or omitted in this regard the case would present a different aspect, but with the proof just referred to of actual notice and retention thereafter, we think this court should not interfere. No objections are urged to the rulings of the trial court upon instructions or the admission of evidence.

Judgment affirmed.

Mary LaFevre v. Emile DuBrule.

1. **VERDICTS—Upon Conflicting Evidence.**—The evidence in this case is conflicting, and as there was enough, if credible to sustain the plaintiff's version of the matter, the verdict in his favor should be final unless prejudicial error has intervened.

2. **NEW TRIALS—On Account of Newly-Discovered Evidence.**—A motion for a new trial upon the ground of newly-discovered evidence is properly denied, where such evidence is merely cumulative, and sufficient diligence in attempting to produce it on the trial is not shown.

3. **WITNESSES—Reputation of, for Truth May be Considered.**—It is proper where there is evidence upon which to base such an instruction, to tell the jury that if the reputation of a witness for truth and veracity is bad that fact may be considered in weighing his testimony.

Replevin.—Appeal from the Circuit Court of Christian County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed June 16, 1897.

HOGAN & DRENNAN and JAMES B. RICKS, attorneys for appellant.

The fourth instruction was improper, because it called the attention of the jury to the character of the defendant below, as shown by the testimony and character witnesses, and then told the jury that if they believed her reputation was bad for truth and veracity, they should take that into consideration in determining her credit. If she was impeached, yet in so far as her testimony was corroborated by other credible evidence or circumstances proved in the case, it was the duty of the jury to give credence to her testimony, and this the court ignored in the instruction complained of, and there was no instruction to cure the defect. *Huddle v. Martin*, 54 Ill. 258; *Crabtree v. Hagenbaugh*, 25 Ill. 233.

A new trial will be granted where the newly discovered evidence may be cumulative if it is decisive in its character. *Sahlinger et al. v. The People*, 102 Ill. 241; *Collins v. The People*, 103 Ill. 21.

Even though newly-discovered evidence is cumulative, a

new trial will be granted under special circumstances and when it is decisive in its nature. *Sahlinger et al. v. The People*, 102 Ill. 241; *Collins v. The People*, 103 Ill. 24.

R. M. Potts and P. M. D. DOWDALL, attorneys for appellee.

A new trial will not be granted for cumulative evidence, not decisive. *Sahlinger et al. v. People*, 102 Ill. 241; *Sulzer v. Yott*, 57 Ill. 167; *Bruce v. Truett*, 4 Scam. 454.

A new trial will not be granted to let in evidence known to appellant at the time of trial. *Isaacs v. People*, 118 Ill. 539; *Petefish v. Watkins*, 124 Ill. 387.

A new trial will not be granted for newly-discovered evidence, where ordinary diligence would have disclosed it before trial. *Klein v. People*, 113 Ill. 601.

OPINION PER CURIAM.

This was replevin for a lot of tools and fixtures pertaining to a barber shop and for a quantity of clothing. The plaintiff recovered, and by the verdict was awarded the sum of five dollars damages for detention. The defendant appeals. The questions of fact were whether the tools and fixtures belonged to plaintiff or defendant, and whether plaintiff was indebted to defendant for a board bill for which the defendant claimed a lien on the clothing. As to both issues the result depended upon the state of accounts between the parties. If the jury believed plaintiff the finding was right, and as the evidence is conflicting, there being enough, if credible, to sustain the plaintiffs version of the matter, the verdict should be final unless prejudicial error has intervened.

It is urged that the second instruction for plaintiff is erroneous. The objection, as stated, is that a part of the goods in controversy were the clothing and baggage of plaintiff, as to which the defendant claimed a lien for board, and that this feature of the defense was ignored. The instruction was confined to the tools and fixtures of the barber shop and can not be construed to affect the articles of apparel. We think the objection is not well taken.

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The fourth is objected to. It is to the effect that if the reputation of defendant for truth and veracity was bad that fact might be considered by the jury in weighing her testimony. There was proof upon which to predicate the instruction. We perceive no valid objection to it.

Newly-discovered testimony was one of the grounds urged for new trial. The testimony so alleged was merely cumulative.

No sufficient diligence to produce it on the trial was shown. No error appears.

Judgment affirmed.

James C. Lewis v. Marie Schwinn et al.

1. **SERVICE OF PROCESS—*Upon Persons Attending Legal Proceedings.***—A plea alleging that the defendant is a resident of an adjoining county, and not of the county in which the suit is brought, and that he was served with process in the latter county, while there for the purpose of attending the taking of testimony in a certain other cause pending between him and one of the plaintiffs in the Circuit Court of said last-named county, is not a good plea in abatement.

2. **ABATEMENT—*Plea of Former Suit Pending.***—A plea alleging that before the commencement of the suit the plaintiffs had impleaded the defendant in the Circuit Court of another county in a suit on the same cause of action in the declaration mentioned, that the parties in both suits were the same, and that the former suit is still pending and undetermined, is a good plea in abatement.

Trespass on the Case, for deceit. Appeal from the Circuit Court of Tazewell County; the Hon. N. W. GREEN, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed June 16, 1897.

HAMMOND & WYETH, attorneys for appellant.

On demurrer sustained to plea in abatement and order to plead over, defendant does not waive his rights by pleading to the merits, but may assign error. *Galveston, etc., R. Co. v. Hook*, 40 Ill. App. 547; *Delahay v. Clement*, 3 Scam.

201; Weld v. Hubbard, 11 Ill. 573; Drake v. Drake, 83 Ill. 526.

Even where defendant asks leave, or the above order is not entered, the question on good authority is saved. Branigan v. Rose, 3 Gil. 129; Union, etc., Ass'n v. Rill, 38 Ill. App. 423; Weld v. Hubbard, *supra*.

The first plea in abatement was that defendant resided in Peoria and not Tazewell county, and that while attending at Pekin, in Tazewell county, as complainant in his own suit, pending in Tazewell county, and against Mary Schwinn and others, and for no other business, he was served with process in the present suit.

This is properly presented by plea in abatement. Gregg v. Sumner, 21 Ill. App. 110; Drake v. Drake, 83 Ill. 526.

Under the policy of the law, the defendant was exempt from service in Tazewell county under the circumstances alleged. Greer v. Youngs, 17 Ill. App. 106; Gregg v. Sumner, 21 Ill. App. 110; Statutes, Chap. 110, Sec. 2.

"The right of a party to be sued in the county where he resides, and to have his cause tried there, is statutory, and he ought not to be denied that right—a right to him, in many instances, of the utmost importance—by any technical and metaphysical learning in regard to pleas in abatement." Humphrey v. Phillips, 57 Ill. 132.

The plea was correct in form and conclusion. Drake v. Drake, 83 Ill. 526; Union Nat. Bank v. First Nat. Bank, 90 Ill. 56.

If not correct in form, the objection should have been by special demurrer. Buckles v. Harlan, 54 Ill. 361.

And especially as the pleas are amendable. Drake v. Drake, *supra*; Midland, etc., R. Co. v. McDermid, 91 Ill. 170.

The second plea in abatement was of another suit pending in Peoria county, the residence of the defendant, for the same cause of action, at the time of plea filed.

This was a good plea. A party may pursue different remedies at the same time, but has no right to harass the defendant by more than one suit of the same kind. Bran-

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igan v. Rose, 3 Gil. 123; Delahay v. Clement, 3 Scam. 201; Bancroft v. Eastman, 2 Gil. 259.

If either the second plea was good, or the two pleas were good, judgment would be given on the second, that the suit abate; if the first plea was good, and the second not, the judgment would have been that the plaintiff be without day, until, etc.

The first plea, as we have seen, concludes properly. It is not a plea to the jurisdiction of the court. Humphrey v. Phillips, 57 Ill. 132 (136); Kenney v. Greer, 13 Ill. 449.

T. N. GREEN and Jos. A. WEIL, attorneys for appellees.

OPINION PER CURIAM.

This was an action on the case for deceit.

The plaintiff obtained a verdict and judgment from which the defendant has prosecuted this appeal.

Among the errors assigned is the action of the court in sustaining a demurrer to certain pleas in abatement filed by defendant: 1st, that defendant was a resident of Peoria county and not of Tazewell, in which the suit was brought, and that he was served with process in the latter county while there for the purpose of attending the taking of testimony in a certain other cause pending between him and one of said plaintiffs in the Circuit Court of said last named county; 2d, that before the commencement of this suit the plaintiffs had impleaded him in the Circuit Court of Peoria County in an action on the case for the same cause of action in the declaration in this suit mentioned; that the parties in both suits were the same and that the said former suit was still pending and undetermined.

The first of these pleas was bad and the demurrer thereto was properly sustained. Greer v. Young, 120 Ill. 184.

The second plea of prior action pending was good. 1 Ch. Pl. 454; 3 Id. 903-4; Branigan v. Rose, 3 Gil. 123.

It was error to sustain the demurrer thereto.

It is unnecessary to consider the other errors assigned. The judgment will be reversed and the cause remanded.

City of Bloomington v. Louis H. Mueller.

1. **NEGLIGENCE**—*Judgment in Suit Based on, Sustained.*—In a suit against a city for damages, caused by a defective sidewalk, the court holds that the case was fairly presented to the jury on the issues made by the pleadings, and that the conclusion reached by the trial court was a fair disposition of the case.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

JACOB P. LINDLEY, city attorney, for appellant; J. H. ROWELL and J. S. NEVILLE, of counsel.

FIFE & BARRY, attorneys for appellee.

MR. JUSTICE BUREGHS DELIVERED THE OPINION OF THE COURT.

On April 7, 1896, while returning home from the meat market, appellee, about seven o'clock in the evening, when passing along on the north side of West Graham street, in the city of Bloomington, Illinois, stepped into a hole in the sidewalk, opposite the alley in the middle of a block there. His foot caught in the hole and he fell against the fence corner there, sustaining personal injuries. Two of his ribs were broken and his lungs injured, from which he suffered considerable pain. Some time elapsed before he could do any work, because of this injury. It was dark when he was thus injured, and the street lamp, about 150 feet from this hole, was not burning. This sidewalk, at the place where the hole was, had been out of repair to a considerable extent for about one month before this injury was received. The piece of board that was rotted off, and made the hole, was not entirely out during all of said month, but it first broke off at one end and dropped down, and afterward broke loose at the other end, and dropped into the hole.

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It was entirely out and lying in the street for four or five days prior to the injury. The amended declaration in this case was demurred to by appellant, and demurrer overruled by the court below, after which appellant filed a plea of general issue to said amended declaration. Trial by jury; verdict finding appellant guilty and assessing plaintiff's damages at \$500. Motions by appellant for new trial and in arrest of judgment overruled, and judgment on verdict for \$500 and costs; from which appellant brings this case to this court by appeal, and assigns thirteen errors on the record.

We have carefully read and considered all the evidence given, and the rulings of the trial court in settling the pleadings, rulings on the evidence, in giving and refusing instructions, in denying appellant's motions for new trial and in arrest of judgment; and find on the whole that appellant ought not to complain as to any of these. The case went fairly to the jury, on the issues presented by the pleadings, and the conclusion reached in the court below is a fair disposition thereof.

We therefore affirm the judgment of the Circuit Court of McLean County herein.

Judgment affirmed.

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**Mutual Reserve Fund Life Association v. Mec. H.
Anderson, Adm'x.**

1. *INSURANCE—Rights Under Policy Held to Have Been Forfeited.*—The court holds that it clearly appears, from the evidence in the record in this case, that the insured did not pay or cause to be paid to appellant, the amount due it on account of mortuary premiums and dues, which was, by the terms of his policy due and payable within thirty days from the first week day of the month of June, 1896; that such payment was not waived, and that by reason of such failure the policy of insurance sued on became, by its terms, null and void.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of McLean County; the Hon. THOS. F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Reversed, with finding of facts. Opinion filed September 18, 1897.

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KERRICK & BRACKEN, attorneys for appellant.

FIFER & BARRY, attorneys for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

November 30, 1895, Samuel T. Anderson made an application in writing for membership and a policy of insurance in the Mutual Reserve Fund Life Association. Contained in said application, among others, was the following provision: "It is hereby agreed * * * that this agreement and the constitution and by-laws of the association, with the amendments thereto, together with this application, are hereby made part of any policy that may be issued hereon; that * * * if any condition or agreement shall not be fulfilled as required herein or by such policy, then the policy issued hereon shall be null and void and all money paid thereon shall be forfeited to said association." * * *

This application was forwarded to the association at its home office in the city of New York, and under date of December 27, 1895, a certificate of membership, or policy of insurance, was issued, forwarded to the agent of the association, who had taken the application, and delivered by him to the applicant.

The following quotations from the certificate, or policy, show the parts material to the consideration of this case:

"In consideration of the answers, statements and agreements contained in the application for this policy of insurance, which are hereby made a part of this contract, and of the payment of sixteen dollars, as a first payment, to be paid on or before the delivery of this policy, and the further payment of six dollars, payable to the association within sixty days from the date of this policy, for the general expense fund of the association, the Mutual Reserve Fund Life Association does hereby receive Samuel T. Anderson, of Bloomington, county of McLean, State of Illinois, as a member of the said association, and upon the condition of the payment of seven and 28-100 dollars, on account of mortuary pre-

miums, and dues, within thirty days from the first week day of the months of April, June, August, October, December and February next ensuing, and of the payment as hereinafter provided, within thirty days from the first week day of said months in every year, during the continuance of this policy, of the subsequent mortuary premiums and dues, there shall be payable to the executors or administrators of said member, the sum of two thousand dollars, at the home office of the association, in the city of New York, within ninety days after acceptance of satisfactory evidence to the association of the death of said member, made out, as required, upon its blank forms provided therefor, subject to all the provisions, requirements and benefits stated upon the second page of this policy, which are hereby made a part of this contract."

On said second page, among others, are the following :

"III. If any of the stipulated payments shall not be made on or before the date, as provided therefor in this contract, at the home office of the association, in the city of New York, or to a duly authorized local treasurer of the association, furnished with a receipt signed by the president, secretary or treasurer of the association, then this policy shall expire and become null and void. All payments made thereon shall be forfeited to the association whenever this contract shall terminate."

"V. All notices addressed to a member, or other person designated by said member, at the last postoffice address appearing on the books of the association, shall be deemed a sufficient notice, and affidavit of addressing and mailing the same according to the usual course of business of said association, shall be held to be conclusive proof of due notice to every person acquiring any interest hereunder. And in the event of the non-receipt of a notice, it shall be, nevertheless, a condition precedent to the continuance of this policy, that a sum equal at least to the amount of the last preceding mortuary premium and dues paid, shall be paid said association, within thirty days from the first week day of the month when due, and any deficiency in said amount shall be paid upon the demand of the association. Notice

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that a mortuary premium and dues are payable to said association at the dates written on the first page of this policy in every year, is hereby given and accepted for all purposes, and any further or other notice is expressly waived."

"XII. This contract shall be governed by and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." * * *

The following quotations from the constitution and by-laws contain the material portions thereof for the proper construction of this contract, in view of the evidence in this record.

ARTICLE X.

"Sec. 3. An assessment notice or other notice addressed to a member, or other person designated by him, at his postoffice address, as it appears upon the books of the association, shall be deemed a sufficient notice; and affidavit, or proof of addressing and mailing the same according to the usual course of business of said association, shall be taken and admitted as evidence, and shall be, constitute, and be deemed and held to be conclusive proof of due notice to said member and every person accepting or acquiring any interest thereunder."

ARTICLE XI.

"Sec. 5. On the first week day of the months of February, April, June, August, October and December of each year (or at such other dates as the board of directors may, from time to time, determine), an assessment shall be made upon the entire membership in force, at the date of the last death of the audited death claim prior thereto, for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member."

"A member failing to receive a notice of an assessment, on the first week day of February, April, June, August, October and December, for his share of the losses occurring during the time specified, it shall be his duty to notify the home office in writing of such fact."

"Sec. 6. If, at any time, any person secures membership in this association by concealing any fact, or if the statements in his application for membership are, in any respect, untrue; or if any of the conditions or provisions upon which the certificate of membership is issued are violated, or if any of the conditions of the certificate of membership or of the constitution or by-laws are violated by the member, then, and in every such case, such membership shall at once cease and determine, and the certificate shall be null and void, and all payments made thereon forfeited to the association."

By the terms of the contract, the first payment required to be made thereunder, after the issuance and delivery of the policy, was the sum of \$6, payable to the association within sixty days from the date of the policy, for the general expense fund of the association. This payment became due and payable, therefore, on or before February 25, 1896. It was not paid on or before that date.

Under date of March 30, 1896, the amount of this past due payment was forwarded to the association, together with a written application for reinstatement of the policy and certificate of health, signed by S. T. Anderson. This application for reinstatement and certificate of health was approved by the association under date of April 4, 1896, and the policy reinstated.

The next payment upon the policy, under the terms of the contract, was the sum of \$7.82, on account of mortuary premiums and dues, and which was due and payable within thirty days from the first week day of the month of April, 1896. This payment was forwarded to appellant, under date of April 23, 1896, and received by it.

The next payment on this policy, in accordance with the terms of the contract, was the sum of \$7.82, on account of mortuary premiums and dues, due and payable within thirty days from the first week day of the month of June, 1896. Notice that such payment was due at the time stated was specifically given S. T. Anderson, by appellant, and a further and additional notice thereof was also given him on May 29, 1896. This payment not being made on or

before the date when due, a delinquent notice, calling attention to the lapse of the policy, and stating the terms upon which the same could be reinstated, was mailed to Anderson on July 17, 1896, and he made no reply thereto; a second delinquent notice to the same effect was mailed to him on August 5, 1896, and he took no notice thereof. Anderson died August 10, 1896.

On August 20, 1896, Messrs. Fifer & Barry, attorneys for appellee, wrote appellant, as follows:

"We are the attorneys for Mrs. Mec. H. Anderson, whose deceased husband held policies Nos. 200,516 and No. 200,517, in your company. His death occurred on the 10th day of August, 1896. We understand that the policies were in force, and we would like for you to send blank proofs of death.

Very truly yours,

(Signed)

FIFER & BARRY."

This letter was received by the defendant association on August 25, 1896, and on the same day a letter was written to Messrs. Fifer & Barry in reply, reading as follows:

"Your favor of the 20th inst. is at hand. We herewith enclose proof blanks, which we do at your request, without prejudice to, or waiver of, any of the rights of the association in the premises. We would further state that policies Nos. 200,516-17, issued to Samuel T. Anderson, for \$3,000 and \$2,000, lapsed for the non-payment of mortuary call No. 86, due and payable on or before June 1, 1896. If, however, you persist in making claim under said policies, the association will require the performance of all the conditions precedent as provided in the contract.

"Yours very truly,

"(Signed)

GEORGE W. HARPER,

"Vice-Chairman Death Claim Department."

On August 27, 1896, this suit was commenced. The declaration avers, without any qualification, that Anderson paid all premiums, dues and other charges for which he was liable under his contract. Appellant filed thereto a plea of general issue, and a number of pleas setting up that Ander-

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son had not paid the mortuary premiums and dues which, under his contract, he was required to pay on or before July 1, 1896. All those pleas, but the general issue, were demurred to on the ground that they amounted to the general issue, and the demurrer was sustained on that ground.

There was a trial by jury and a verdict for appellee for \$2,000. Motions for new trial and in arrest of judgment were made by appellant, and overruled by the court, and thereupon a judgment was entered on the verdict and for costs against appellant, and it brings the case to this (Appellate) Court by appeal.

As we view it, we will not be compelled to comment upon and decide the numerous alleged errors that the appellant insists intervened in the proceedings in the court below in the trial of this case, but will confine our opinion to such substantial errors committed by the trial court as compel us to reverse its judgment.

The declaration in this case averred that the policy of insurance sued on was issued December 27, 1895, that Samuel T. Anderson died August 10, 1896, and that from the date of the policy to his death he remained a member of appellant association in good standing, and complied with all the laws and requirements of appellant, and paid all premiums and dues, and other charges for which he was liable upon his said contract with appellant, and that upon the death of said Samuel T. Anderson, appellant became liable to pay to the executors or administrators of said Samuel T. Anderson, the said sum of \$2,000; that appellee was, on August 18, 1896, appointed by the Probate Court of McLean County, Illinois, administratrix of the estate of said Samuel T. Anderson, and that appellant has denied its liability on said policy, and has wholly neglected and refused to pay the same.

The plea of general issue, by appellant, to said declaration put in issue the material facts averred therein.

After a careful reading of all the evidence contained in this record, and fully considering the same, we are compelled to conclude that it clearly appears therefrom that

said Samuel T. Anderson did not pay or cause to be paid to appellant the \$7.82 due it on account of mortuary premiums and dues, which was, by the terms of his policy due and payable within thirty days from the first week day of the month of June, 1896, by reason whereof, the policy of insurance, became by its terms null and void.

It is true that an attempt was made by appellee, on the trial in the court below, to prove that appellant had waived the payment of this \$7.82 when due, by the terms of the policy sued on; and she contends that as forfeitures of contracts are not favored in law, that from the proofs in this record, she ought to recover the \$2,000 in question. We are, however, fully satisfied that no such facts appear in this record that would warrant a court of justice in holding that appellant waived the payment of said \$7.82 on account of mortuary premiums and dues when it became due, which was within thirty days from the first week day of the month of June, 1896, by the terms of the policy sued on. And we are further satisfied that it clearly appears from the evidence in this record that the said Samuel T. Anderson was fully aware, in his lifetime, that his said policy was lapsed and null and void, and that he intentionally refrained from paying his said "Mortuary Call No. 86," as it is known in this record, intending thereby not to keep up said policy.

It therefore follows that the court below erred, in not granting appellant's motion for a new trial, and in entering a judgment upon the verdict of the jury, which was manifestly against the evidence and the law of this case.

And inasmuch as we are of the opinion that from the facts proven in the court below, appellee can not recover in this case, we reverse the judgment of the Circuit Court of McLean County herein, and will not remand this case to that court for a new trial, but will enter a judgment in this court against appellee for costs to be paid in due course of administration.

Judgment reversed.

Lennox v. Harsh.

FINDINGS OF FACTS BY THE COURT, TO BE INCORPORATED IN
THE FINAL JUDGMENT BY THE CLERK.

The court finds that the contract, or policy of insurance, for \$2,000, issued by appellant to Samuel T. Anderson, and dated December 27, 1895, upon the life of said Samuel T. Anderson, for the benefit of the executors or administrators of the estate of said Anderson being the contract sued on in this case, became and was null and void, before the death of said Anderson, by reason of the non-payment, to appellant, of the sum of \$7.82, being the mortuary premium and dues due appellant from said Anderson within thirty days from the first week day of the month of June, 1896, as provided by said contract of insurance.

And we further find that the payment of said sum of \$7.82 by said Samuel T. Anderson to appellant, at the time specified in said contract of insurance, was not waived by appellant, and that the appellee has no cause of action against appellant.

John Lennox v. Floyd Harsh.

1. **NEW TRIALS**--*Reasons for Not Waived by Failure to Present on Oral Argument.*—When one of the parties to a suit files with the clerk of the trial court in apt time his written motion for a new trial, he does all that the law requires him to do, to save the points mentioned therein, and the fact that some of them are not mentioned on an oral argument on such motion does not amount to a waiver.

2. **JUDGMENT**--*Limited to Sum Claimed.*—In suits commenced before justices of the peace, the recovery is limited to the amount of the claim indorsed on the summons, and it is error to render judgment for the plaintiff for a greater sum.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 18, 1897.

HARBAUGH & WHITAKER, attorneys for appellant.

R. M. PEADRO, attorney for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

On June 1, 1896, appellee commenced this suit before a justice of the peace of Moultrie county, Illinois, for \$111.50, that being the amount indorsed on the back of the summons issued on that date by the justice before whom the suit was commenced. After trial before the justice of the peace, a judgment was rendered by the justice in favor of appellee against appellant for the full sum claimed, to wit, \$115.50. Appellant, by appeal, took the case to the Circuit Court of Moultrie County, where the case was tried in that court by jury, and a verdict returned for appellee for \$120. After verdict, before judgment, and during the term of court at which verdict was rendered, appellant made and filed in writing a motion to set aside the verdict and grant a new trial, assigning six reasons therefor, the sixth reason being stated as follows: "The verdict of the jury is for a sum greater than the demand stated on the summons issued by the justice of the peace." But the court below overruled said motion for a new trial, and gave judgment on the verdict for appellee against appellant for \$120 and costs, to which action of the court below in overruling said motion, appellant then and there excepted. Appellant brings this case to this court by appeal, and among others assigns the following error: "Third. The court erred in rendering judgment against the defendant (appellant) for an amount greater than the demand on back of summons issued by the justice of the peace."

"Fourth. The court erred in overruling defendant's (appellant's) motion for a new trial." This is the showing made on the transcript of the record herein, filed in this court on March 6, 1897. On May 18, 1897, appellee files a motion in this court suggesting a diminution of the record, and for leave to file additional record, which motion, upon being presented to this court on June 29, 1897, one of the days of the May term, A. D. 1897, was by this court taken with the case.

We have fully considered this motion and concluded that we can not allow same, because, while the learned judge who presided when this case was tried in the Circuit Court, when the bill of exceptions herein was, on January 28, 1897, presented to him for his signature, did run a line with his pen through the words constituting the sixth reason why a motion for a new trial should be allowed, and wrote over the same: "I erase these two lines because point was not made on motion for new trial," and signed his name thereto. Yet the fact does appear from the record as first sent up to this court, together with the showing made in this motion, that appellant did file his motion for a new trial in writing with the clerk of the court below in apt time, and it did contain the sixth reason as originally certified here; but because, in his oral presentation of said motion to the Circuit Court, he did not urge to the court below his sixth reason, therefore, appellant contends it should by this court be considered, that he did not in writing assign said sixth reason why a new trial should be given him by the court below. The only effect, if said motion for leave to file additional record should be allowed by this court, would be to have the record show that appellant did in writing file with the clerk of the court below, in apt time, his motion for a new trial with his sixth reason, as before stated, but that in his oral argument on said motion in the court below he did not make that point.

We are of the opinion that when appellant filed with the clerk of the court below, in apt time, his motion in writing for a new trial, which contained the sixth reason why his motion should be allowed by the trial court; he did all that section 57 of chapter 110 of Hurd's Revised Statutes of Illinois required him to do, to save that point.

That section among other things provides: "* * * If either party may wish to except to the verdict, or for other causes to move for a new trial, * * * he shall, before final judgment be entered, or during the term it is entered by himself or counsel, file the points in writing, particularly specifying the grounds of such motion * * *."

Inasmuch, therefore, as the trial court gave judgment for \$120, when the demand on the summons in the justice court was only for \$111.50, it committed an error, which compels us to reverse the judgment of the court below in this case, under the holding of our Supreme Court in the case of Chicago, Burlington & Quincy R. R. Co. v. Minard et al., 20 Ill. 9, in which it says: "We think we are judicially informed of the contents of the summons and of the claim indorsed upon it, and that the judgment of the Circuit Court was for more than the amount of such claim and interest, which was erroneous." See also T., P. & W. Ry. Co. v. Pence, 71 Ill. 174.

Appellant assigns and urges other errors on the record here, but for the reasons above given, the judgment of the court below, in this case, must be reversed, and the cause remanded to the Circuit Court of Moultrie County for a new trial. Hence we deem it unnecessary to consider and decide the other errors assigned.

Reversed and remanded.

Scott County v. Thomas Drake.

1. *COUNTIES—Liability of, For Board of Prisoners in County Jail.*—A county is liable to its sheriff for the sustenance of a prisoner confined in its county jail under a mittimus issued on a judgment of the Circuit Court of such county, imposing a fine against him for violating an ordinance of a village of such county.

2. *JAILERS—Can Not Recover from a County, Fees for Dieting Prisoners.*—A keeper of a jail, appointed by the sheriff of a county, can not recover of the county the fees of the sheriff, for keeping, dieting and discharging prisoners.

Claim, against a county disallowed by county board. Appeal from the Circuit Court of Scott County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1897. Reversed without remanding. Opinion filed September 18, 1897.

THOMAS J. PRIEST and JAMES A. WARREN, attorneys for appellant.

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J. M. Riggs, attorney for appellee.

MR. JUSTICE BUREOUGHs DELIVERED THE OPINION OF THE COURT.

At the April term, 1896, of the Circuit Court of Scott County, George H. Dodson was fined \$200 for violating an ordinance of the incorporated village of Bluffs, in said county. The judgment concluded with order for his imprisonment in the county jail if he did not pay the fine and costs, upon demand, under writ of execution. He did not pay the fine when demanded, and on June 10, 1896, a *capias pro fine* issued, commanding the sheriff to take said Dodson and keep him until he paid the fine and costs, unless he should be otherwise sooner discharged, limiting the imprisonment to not exceeding six months. This writ was delivered to the sheriff of said county, and under it he took the body of said Dodson and delivered him to appellee, who was then, and thereafter continued to be, jailer, by legal appointment from the sheriff. Appellee received the prisoner according to the mandate, and held him in confinement from June 10 until August 10, when he was discharged by order of said court. Appellee was appointed jailer by the sheriff, December 4, 1894; his sole compensation for furnishing food, washing and other necessities for all prisoners was to be such allowance as was provided by law. During the whole period, from the appointment of the appellee, December 4, 1894, up to the time this controversy arose, in September, 1896, appellee made out quarterly accounts against the said county, in his own name, for all he became entitled to for sustaining prisoners, according to his contract with the sheriff, and presented them to the county board, which body audited, and with now and then slight modifications allowed them, and ordered county warrants to be drawn therefor in favor of appellee, in his own name. June 15, 1896, he made out and presented to the county board a similar account in which his charges for receiving Dodson and sustaining him six days were included. The county board allowed this account to appellee, including these charges,

and ordered a warrant to be drawn on the county treasury therefor, payable to appellee. This was done by the board June 17, 1896, and on that day the county board informed appellee that they would not pay any more of the charges for sustaining Dodson, and that in the future he would have to look to the village of Bluffs for his pay. As already stated, Dodson remained in custody till August 10 following. The said village refused to pay the charges. Dodson was insolvent. Appellee made out his bill for the cost of sustaining the prisoner from June 16, to August 10, amounting to \$44.75, and presented it to the county board at their meeting in September, 1896, and it was rejected by an order entered of record as follows:

"The bill of Thomas Drake for \$44.75, board of George H. Dodson, in Scott county jail, be and the same is by this board rejected, and is not allowed, the same not being a county charge." From this order appellee appealed to the Circuit Court under the provisions of section 35, page 443, Rev. Stat. Ill., 1895. In the Circuit Court the case was heard by the court without a jury, on an agreed state of facts, of which the above is the substance, and resulted in a finding and judgment in favor of appellee for \$44.75, and an order of that court that the county clerk draw a warrant upon the county treasury for the said sum of \$44.75. No propositions of law were submitted to the trial court. Appellant brings the case to the Appellate Court of the Third District of Illinois by appeal.

The question presented for decision by this record is this, is the appellant, the county of Scott, liable to appellee for the sustenance of one Dodson, a prisoner confined in the county jail of said county, under a mittimus issued on a judgment of the Circuit Court of same county, imposing a fine against him of \$200 and costs for violating an ordinance of the village of Bluffs, in said county.

We are of the opinion that appellant is liable for such sustenance, but not to appellee, who is but the deputy or assistant jailer under the sheriff of said county, by appointment of said sheriff, under Secs. 2 and 3, Chap. 75, Illinois Statutes, which are as follows:

"Sec. 2. The sheriff of each county in this State shall be the keeper of the jail of the county, and have the custody of all prisoners in such jail."

"Sec. 3, Ibid. He (sheriff) may appoint an assistant under him, and remove him at pleasure, for whose conduct he shall be responsible." Under Sec. 4 of same chapter, "The keeper of the jail shall receive and confine in such jail, until discharged by due course of law, all persons who shall be committed to such jail by any competent authority." And under Sec. 24, same chapter, "The cost and expense of * * * keeping and maintaining the prisoners thereof, except as otherwise provided by law, shall be paid from the county treasury, the account therefor being first settled and allowed by the county board." Under Sec. 19, Chapter 53, Revised Statutes of Illinois, "*The sheriff*" is allowed fees, as follows: For committing each prisoner to jail, in counties of first and second class, fifty cents; third class, thirty cents; and the same for discharging each prisoner from jail; and for dieting each prisoner, such compensation to cover the actual costs as may be fixed by the county board." These fees and allowances are, by the terms of our statute, *to the sheriff*, and he alone can demand and sue for the payment thereof from the county, and not his deputy or assistant jailer. *Seibert v. Logan Co.*, 63 Ill. 155; *Union County v. Patton*, 63 Ill. 458. Inasmuch, therefore, as the court below gave appellee a judgment against appellant for \$44.75, for the maintenance of the said prisoner, Dodson, on the facts above stated, it committed an error which compels us to reverse that judgment, and inasmuch as we hold that appellee can not recover in this case from appellant, we will not remand the case.

Judgment reversed.

William M. Ladd et al. v. T. P. Judson et al.

71	283
174	344

1. CREDITOR'S BILLS—*A Judgment at Law Held Essential Under the Facts of This Case.*—A father died, leaving certain property to a trustee in trust for his children. *Held*, on a bill by a creditor of one of the

children, that the case was not within the rule that a creditor may resort to a court of equity without first obtaining a judgment at law, when the creditor's claim has some equitable element in it, such as a trust or the like, and that the bill must be dismissed.

2. *SAME—Certain Facts Held Not to Remove the Necessity of Obtaining a Judgment at Law.*—The fact that the property of a debtor is not subject to attachment at law, being an equitable interest only, and that personal service can not be had on the debtor, do not give a creditor the right to resort to equity in the first instance to establish his debt and have satisfaction out of the equitable interest.

3. *SAME—Can Not be Based on a Foreign Judgment.*—A judgment of a court of another jurisdiction can not form the basis of a creditor's bill in this State.

Creditor's Bill.—Appeal from the Circuit Court of Montgomery County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

HOWETT & JERR, attorneys for appellants.

"A creditor can proceed in equity in the first instance if his claim has some equitable element in it, such as a trust or the like; that is, a creditor may maintain a creditor's bill before obtaining judgment at law where his claim has some equitable element in it," as we claim the case at bar has. *Dormueil v. Ward*, 108 Ill. 216.

"When a fund can not be reached at law and is only accessible in a court of chancery as in the case at bar, then creditors may resort to equity in the first instance." *Steere et al. v. Hoagland et al.*, 39 Ill. 264.

Where a claim has to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law. *Miller v. Davidson*, 3 Gilm. 523; *Russell v. Clark's, Executors*, 7 Cranch, 87; *Peay v. Morrison's Executors*, 10 Grat. (Va.) 149; *Pendleton v. Perkins et al.*, 49 Mo. 565.

If the property be not subject to attachment at law, being an equitable interest only, and personal service can not be obtained on the debtor so that the creditor is without rem-

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edy at law for the establishment of his debt, he may in the first instance go into equity, establish his debt and have satisfaction out of the equitable interest. *Getzler v. Saroni*, 18 Ill. 511.

That the complainants are entitled to relief in this case, without first having obtained a judgment in the State court of Illinois and having execution issued thereon and returned no property found, there is no question, and to sustain this we cite the following cases: *Earle v. Grove*, 92 Mich. 285; *McCartney v. Bostwick*, 32 N. Y. 61; *Ricketson v. Merrill et al.*, 148 Mass. 76, 19 N. E. Rep. 11; *Scott v. McMillen*, 1 Littell (Ky.) 302.

JAMES M. TRUITT, attorney for appellees.

It is well settled that a creditor's bill will not lie in the courts of one State to enforce a judgment recovered in another State. *Steere v. Hoagland*, 39 Ill. 264.

When a creditor seeks to satisfy his debt out of some equitable estate of the debtor, which is not liable to a levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and return of the execution "*nulla bona*" before he can come into a court of equity for the purpose of reaching such equitable estate. This is necessary to confer jurisdiction upon that court and has been uniformly held by our courts. *Ishmael v. Parker*, 13 Ill. 324; *Greenway v. Thomas*, 14 Ill. 271; *McConnel v. Dickson*, 43 Ill. 99-109; *Mugge v. Ewing*, 54 Ill. 236; *Dewey v. Eckert*, 62 Ill. 218; *Moshier v. Meek*, 80 Ill. 79; *Scripps v. King*, 103 Ill. 469.

By the decided weight of authority sustained by the decisions of our own Supreme Court, courts of equity will entertain jurisdiction to give creditors relief in the following classes of cases only:

First. Where a debtor has fraudulently conveyed his property to hinder and delay his creditors, a creditor may, as soon as he has recovered judgment, file his bill to remove such fraudulent conveyance out of the way of his execution issued under his judgment at law. *Wisconsin Granite Co. v. Gerrity*, 144 Ill. 77.

Second. In cases where a creditor seeks by his bill to reach the equitable estate of his debtor, which can not be reached at law, he must first recover a judgment at law and have execution returned unsatisfied to give jurisdiction to a court of equity. In such cases the best and only evidence that the creditor has exhausted his legal remedies is the actual return of an execution unsatisfied. *Russell v. The Chicago Trust & Savings Bank*, 139 Ill. 538, and cases cited on page 551.

Third. In no case will a court of equity entertain jurisdiction of a bill to collect a purely legal demand until the creditor has exhausted his remedy at law by recovering a judgment at law and having execution thereon returned *nulla bona*. The exceptions to this rule are rather nominal than real. In all cases where bills of that character have been entertained, the claim of the complainant had some equitable element in it, such as a trust or the like. *Dormueil v. Ward*, 108 Ill. 216; *Gore v. Kramer*, 117 Ill. 176; *The Detroit Copper & Brass Rolling Mills v. Ledwidge*, 162 Ill. 305.

Fourth. In the administration of insolvent estates, after the allowance of a creditor's claim, which is equivalent to obtaining a judgment at law, the creditor may proceed by bill in equity to set aside a fraudulent conveyance made by his debtor in the latter's lifetime. *Eads v. Mason*, 16 Ill. App. 545, and cases cited.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

Appellants filed in the Circuit Court of Montgomery County, Illinois, on September 15, 1896, their bill in chancery against appellees, alleging that there was due and owing appellants from appellees the sum of \$981.11, and interest, being the balance due on a judgment recovered by them, on September 24, 1895, in the Circuit Court of Josephine County, Oregon, that court having jurisdiction of appellees, by service of process on them; and that it was a court of competent jurisdiction; that said judgment still

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remains in full force and effect. Said bill also alleges that appellees T. P. and Jennie H. Judson are residents of Oregon, and have been for more than ten years; that appellants are unable to make the said amount of said judgment from said appellees last named, in the State of Oregon, because they have no property or effects, which could be levied upon, or which could be reached in any proceeding in law or in equity in that State. That one Solomon Harkey, the father of appellee Jennie H. Judson, died testate in Hillsboro, Montgomery county, Illinois, about April 20, 1892, owning, when he died, a large amount of real estate in said Montgomery county; that said Harkey left a last will and testament, in which he devised all his real and personal estate to appellee Alexander A. Cress, one of the defendants to said bill, in which will the testator authorized and empowered said Cress to sell the real estate testator owned, and convert it into money, and divide the money so received equally among his (testator's) children, naming them, among which children he names appellee Jennie H. Judson as one, as will more fully appear from said will, which is attached to said bill; that there is now remaining in the hands of appellee Cress, as trustee under said will, and undisposed of, 320 acres of the real estate devised by said will, and to be sold by said trustee, and the proceeds divided among testator's said children; that the appellees T. P. and Jennie H. Judson are insolvent and non-residents of Illinois; that there is no way in law by which the property rights and interests held by said Alexander A. Cress, in trust for said Jennie H. Judson, under the said will, can be reached; and that there is no other property of any kind in the State of Illinois, owned by appellees, which can be reached by attachment or otherwise, to satisfy said balance of said judgment. The bill also alleges generally, upon information and belief, that appellee Cress, as trustee under said will, has control of notes, accounts, choses in action, etc., which he holds in trust for appellees T. P. and Jennie H. Judson, under the terms and conditions of said will, and prays discovery.

The bill alleges, further, that said T. P. and Jennie H.

Judson have refused to pay the said amount due the complainants, or to apply thereon the equitable interest which is held in trust for them by said Cress, all of which is contrary to equity and good conscience; and that by reason of said Judsons being non-residents of the State of Illinois, and keeping themselves out of the jurisdiction of the courts of Illinois, appellants have been unable to obtain judgment in Illinois against them. The bill prays that appellee Cress may be required to inform the court as to the amount and value of all the property interest and effects held by him in trust for the use of T. P. and Jennie H. Judson, whereby appellants' said debt could be satisfied, and that the said Judsons may be decreed to pay appellants said amount due them, as aforesaid; and that appellee Cress, the trustee under said will, may be required, if on hearing he is found to hold real estate for the use of the said Judsons, to sell or dispose of it, or so much of it as may be found necessary to satisfy appellants' said debt; and that appellees may be declared to have a lien upon all property held or owned by said Cress in which the said Judsons are interested; and for such other and further relief as to the court may seem proper.

Copy of will of Solomon Harkey is attached to the bill. This gives to his wife certain interest during her natural life. Item 4 is as follows: "I will and devise to my executor or executors, hereinafter named or described, all my real estate, including all that devised to my wife for life, but subject to that devise for life to her, in trust for the following purposes or objects: First. That he may sell said real estate and convert the same into money, and as I don't wish my said real estate sacrificed, I hereby authorize and empower my executor or executors to sell the whole or any part or any parcel thereof and convey the same when sold, on such terms and at such times as he may deem for the best interest of my estate. He is expressly authorized to use his discretion in selling any and all real estate and make the sales thereof privately or publicly as shall seem to him best for my estate. Secondly. The rents and profits of said estate, except so much thereof as shall be necessary to make such repairs, as are

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needful to keep the improved parts of said real estate from deteriorating in value and pay the taxes on my entire real estate, including that in which my wife has a life estate, together with proceeds of said real estate, shall be divided into seven equal parts; that is, after the costs and expenses of my said real estate have been paid, and one-seventh part thereof shall be paid as follows: To my sons, William P. Harkey, Jacob M. Harkey and Solomon S. Harkey; and one-seventh part to my daughters, Sarah C. Wilton and Jennie H. Judson; one-seventh part to my granddaughter, Martha J. Blackburn; one-seventh part thereof to the children of my deceased son or the survivors of them, viz., Ida Harkey and Ella Lee Harkey, one-seventh part thereof."

Said will names the said Alexander A. Cress as the sole executor thereof.

Appellee Alexander A. Cress interposed a demurrer to said bill, and for cause of demurrer says appellants have stated no such case as entitles them in a court of equity to any relief or discovery from him; and for special cause of demurrer, he says: It does not appear from said bill that appellants have recovered a judgment at law on their said claim against said T. P. and Jennie H. Judson or either of them, in the State of Illinois, as by law appellants were required to do before filing said bill. And prays to be dismissed with costs. The Circuit Court sustained said demurrer, and appellants elected to stand by their bill; thereupon the court dismissed the bill, and taxed the costs to appellants. Appellants, bring this case to this court by appeal; assigning the dismissal of said bill on said demurrer as error.

Appellants insist, first: That a creditor may maintain a creditor's bill before obtaining a judgment at law, when his claim has some equitable element in it, such as a trust or the like. Second. That when a creditor's claim must be satisfied, if at all, out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to a court of chancery, which will not require that the claim should be first established in a court of law.

Appellants concede that in this State the general rule is that a creditor's bill can not be sustained if the creditor has not first obtained a judgment in this State and had execution issued and returned no property found.

We fully agree with appellants in their first contention, that a creditor may, in this State, resort to a court of equity without first obtaining a judgment at law, when the creditor's claim has some equitable element in it—such as a trust, or the like; for to that effect is the doctrine of the cases of *Dormueil v. Ward*, 108 Ill. 216; *Gore v. Kramer*, 117 Ill. 176; *Detroit Copper & Brass Rolling Mills v. Mathew Ledwidge et al.*, 162 Ill. 305, and the cases in this last case referred to and commented upon. But does the case at bar fall within that doctrine? We think not. The claim of appellants against appellees, the Judsons, is a mere contract debt evidenced by a judgment of an Oregon court; and in it (the debt or claim) there is as against none of the appellees an equitable feature, such as is meant in the decisions of our Supreme Court by that term as being like a trust; because while under the averments of said bill there may be property or effects in the hands of appellee Alexander A. Cress, which are held by him in trust for Jennie H. Judson, one of the appellees, yet it was placed there by her father's will, and not by any fraudulent act of his daughter Jennie, to the prejudice of appellants.

On the second contention of appellants, as above stated, there seems to be some expressions used in some of the opinions delivered in cases decided by our Supreme Court that would tend to establish that the exception to the rule, as contended by appellants, exists in this State, notably in the case of *Getzler v. Saroni*, 18 Ill. 518, where the court says: "If the property be not subject to attachment at law, being an equitable interest only, and personal service can not be obtained on his debtor, so that he is without remedy at law for the establishment of his debt, he may, in the first instance go into equity, establish his debt and have satisfaction out of the equitable interest." But this was not necessary to be said in deciding the case then before the

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court, and we think it was only *dicta*, at least in the "Ledwidge case," *supra*, in 162 Ill. at page 310 of the opinion. Quoting from page 335 of the opinion of that court in Bigelow v. Andress, 31 Ill. 322, the court says: "The complainant must first establish his claim at law before a court of equity will lend its aid. And it is for the reason that a court of chancery does not assume jurisdiction to settle and establish purely legal rights. If jurisdiction were entertained in this case to ascertain the legal validity of complainant's demand, it being wholly of a legal character, so as to afford relief against obstructions that would afterwards present themselves to an execution, no reason is perceived why such jurisdiction might not be assumed in all cases where legal demands might be obstructed. This would be an innovation on the settled practice of this court, as well as the chancery practice generally. Whatever may have been held in other courts, we regard this as the practice of this court, too long and too firmly settled to be departed from, simply because it may have been differently held in some other tribunals."

The fact is, after carefully reading the opinion of our Supreme Court in the "Ledwidge case," *supra*, we can not follow, as appellants insist we should, the rule laid down in the case of Earle v. Grove, in 92 Mich. 285, because it is in conflict with our Supreme Court, and we are bound by the rule established by our Supreme Court.

Lastly, appellants contend, that if a judgment at law was necessary for them to obtain before filing their said bill, that they obtained such judgment in the State of Oregon, which was sufficient. In answer to that, we will say: A judgment of another jurisdiction can not be made the basis of a creditor's bill in this State. Steere v. Hoagland, 39 Ill. 264; Winslow v. Leland et al., 128 Ill. 304.

Finding no error in this record, we affirm the decree of the Circuit Court of Montgomery County in this case.

Decree affirmed.

Charles S. Zatlin v. Ida M. Davenport.

1. INSTRUCTIONS—*Held to Fairly Present the Issue Involved.*—The court holds in this case that while some of the instructions given to the jury were not as carefully drawn as they might have been, and while one or more of the refused instructions might have been properly given, that on the whole, the jury were fairly instructed by the trial court and that the verdict was a reasonable determination of the issue, from a consideration of all the evidence in the record.

2. CONTRACTS—*When Suit May be Brought for Breach of.*—When a party agrees to do an act at a future day, and before the day arrives declares he will not keep his contract, the other party may act on this declaration, and bring an action for a breach of the contract before the time for its performance arrives.

Assumpsit, for breach of promise of marriage. Error to the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

J. R. & WALTER EDEN and J. B. SEARCY, attorneys for plaintiff in error.

HARBAUGH & WHITAKER, attorneys for defendant in error.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

About the middle of April, 1895, Ida M. Davenport, an unmarried woman, went to Palmyra, Macoupin county, to visit her sister-in-law, who lived there; she remained there the most of the time, until about June 6, 1895. Shortly after she came to Palmyra she became acquainted with Charles S. Zatlin, an unmarried man, who was a merchant there. This man and woman were frequently together during that time, and they agreed to get married about the first Wednesday in September, 1895. About the second week in May, 1895, these parties commenced having sexual intercourse, from which she became pregnant. Upon Miss Davenport discovering in the early part of June, 1895, that she was with child, she in-

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formed Mr. Zatlin of that fact, and requested him to marry her at once; but he refused to marry her then, and told her "he would never marry her." On June 27, 1895, Miss Davenport commenced this suit in the Circuit Court of Moultrie County, against Mr. Zatlin, for a breach of promise of marriage, alleging seduction in aggravation of damages. Mr. Zatlin by his plea filed, and in his evidence given on trial, denies ever promising to marry Miss Davenport, and swears he never had sexual intercourse with her. On the trial of this case, the jury found by their verdict for Miss Davenport and assessed her damages at \$500. Upon which verdict the trial court rendered judgment. From that judgment Mr. Zatlin, the plaintiff in error, brings this case to this court, and asks that the judgment of the trial court be reversed, because that court erred in its rulings in excluding and admitting evidence, over his objections, and in giving and refusing instructions to the jury; because this suit was prematurely brought; because there is a variance between the evidence and the facts averred in the declaration; and because the verdict and judgment are contrary to the law and the evidence.

After a careful consideration of the record in this case, we are of opinion that the plaintiff in error ought not to complain of the trial court in its rulings on the evidence, when all of the rulings are carefully examined; and while some of the instructions given to the jury were not as carefully drawn as they might have been, and one or more of the refused instructions might have been properly given, yet on the whole, we think, the jury were, by the trial court fairly instructed; and the verdict and judgment, are a reasonable determination of the issues in this case, from all the evidence in this record. As to the verdict and judgment being against the weight of the evidence, we think there is sufficient evidence in the record to support the verdict returned and the judgment rendered, and while on the vital issues in this case, there is a square conflict in the evidence, yet the jury and trial judge who saw the witnesses and observed their manner, were better enabled to say on which

side the truth lay than we are, from reading the record, hence we will not disturb their findings and judgment on that account.

The contention of the plaintiff in error, that this suit was prematurely brought, and that there is a variance between the facts set out in the declaration and the evidence, presents to us the most difficult questions to determine in this case.

We find on the trial of this case in the court below, at no time did plaintiff in error object to any evidence that was taken or offered, because it varied from the facts averred in the declaration; the first time he complained to the trial court in this regard, was in his motion for a new trial; but even if he was then in apt time, we think under the law, after verdict, the evidence sufficiently fits the declaration to sustain the verdict and judgment.

Lastly, was this suit prematurely brought? Upon examination of the authorities cited by plaintiff in error (and other cases we found, upon investigating this question), we find that while there is not a uniform sameness in the holdings of the courts of last resort, in this country and elsewhere, on this question, yet we think the better reasoning is with the courts holding that when a party agrees to do an act at a future day, and before the day arrives, declares he will not keep his contract or do the act, that the other party may act on the declaration, and bring an action for the breach before the day arrives. Bishop on Contracts, edition of 1887, Sec. 1429, p. 580, and cases cited; Beach on Modern Contract Law, Secs. 409 to 412 inclusive, and cases cited; Frost v. Knight, 7 L. R. C. Ex. 111; Watson A. Fox v. Charles G. Kitton, 19 Ill. 519; L. J. Kadish et al. v. A. N. Young et al., 108 Ill. 170; Lake Shore & Michigan Southern Ry. Co. v. Edward S. Richards, survivor, 152 Ill. 59.

Therefore, when Miss Davenport was told by Mr. Zatlin, about June 24, 1895, "that he would not then, or at any time marry her," she had a right to bring suit against him, as she did, on June 27, 1895; notwithstanding his promise

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was to marry her on the first Wednesday in September, 1895.

Finding no reversible error in this record, we affirm the judgment of the Circuit Court of Moultrie County in this case. Judgment affirmed.

National Home Building and Loan Association v. Joseph W. Fifer and Edward Barry.

1. **INSTRUCTIONS.**—*An Instruction Properly Refused in View of the Evidence.*—The instruction that "plaintiffs are bound to establish by a fair preponderance of the evidence, that they are licensed to practice law in the State of Illinois" was properly refused, as there was evidence that plaintiffs had expended money for defendant which they were entitled to recover.

2. **EVIDENCE.**—*A Verdict Approved as in Accordance With.*—In a suit to recover the value of legal services the court holds, in view of the evidence, that there is no merit in the contention that the judgment should be reversed for want of proper proof in the record that the plaintiffs had been licensed to practice law in this State.

3. **PRACTICE.**—*As to Objections to Evidence.*—In a suit to recover the value of legal services the witnesses were asked what the legal services rendered were reasonably worth, to which general objections were made. *Held*, that the objection that the question should have been confined to asking what were the usual and customary fees for similar services should have been made specifically in the trial court, and that, this not having been done, it could not be raised on appeal.

4. **DAMAGES.**—*Amount of, a Question for the Jury.*—In a suit to collect attorney's fees where no amount was agreed on by the parties when the contract of employment was made, the sum to be awarded is a question of fact for the jury and trial judge to determine, and in this case the court can not see that the amount assessed (\$2,800) is so grossly excessive as to warrant a reversal of their finding in that regard.

Assumpsit, for attorney's fees. Appeal from the Circuit Court of McLean County; the Hon. THOS. F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

JESSE R. LONG, attorney for appellant.

Our statute prohibits any person from practicing law in a court of record "without having previously obtained a

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license for that purpose from some two of the justices of the Supreme Court," which license shall authorize him "to demand and receive fees for any services which he may render as an attorney and counselor at law in this State. Sec. 1, Ch. 13, R. S.

It has been expressly held by our Supreme and Appellate Courts that it must appear the parties who sue for fees as attorneys are licensed to practice law in Illinois, and that if they are not licensed attorneys in Illinois, or were not when the services were rendered, there can be no recovery. *Tedrick v. Hiner*, 61 Ill. 189; *City of East St. Louis v. Freels*, 17 Ill. App. 339; *Sellers v. Phillips*, 37 Ill. App. 74.

An attorney at law can not recover for professional services without proof of the qualifications required by the statute. *Perkins v. McDuffee*, 63 Me. 181; *Ames v. Gilman*, 10 Met. (Mass.) 239; *Humphreys v. Harvey*, 1 Bing. N. Cas. 62, 27, E. C. L. 312; *Williams v. Jones*, 2 Ad. & E. N. S. 276, 42 E. C. L. 673.

"In fixing the amount of a reasonable fee the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not to what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge?" *Reynolds v. McMillan*, 63 Ill. 46; *Dorsey et al. v. Corn*, 2 Ill. App. 533; *Casler v. Byers*, 28 Ill. App. 128; 129 Ill. 657.

ROWELL, NEVILLE & LINDLEY, attorneys for appellees.

The instruction to the effect that if appellees had not proven that they were regularly licensed attorneys the jury should return a verdict for the defendant, was properly refused, because the evidence showed that appellees had paid out and expended \$13.65 for the use and benefit of appellant at its request, and the instruction ignored their right to even recover that sum. *Sellers v. Phillips*, 37 Ill. App. 74; *Hughes v. Dougherty*, 62 Ill. App. 464; *Perkins v. McDuffee*, 63 Me. 181.

Where the question of the license of a physician arises between the doctor and one who employed him, the license to practice will be presumed. *Williams v. People*, 20 Ill. App. 95; *City of Chicago v. Wood*, 24 Ill. App. 40.

In an action for attorney's fees it was shown that the plaintiff acted as an attorney in the Court of Common Pleas in pursuance of a retainer by defendant. That was *prima facie* evidence that he was at that time an attorney of that court, and unless this evidence was rebutted, the plaintiff was entitled to recover. It lay upon defendant to show that plaintiff had no license. *Pearce v. Whale*, 5 Barn. & C. 38.

Where it appears that the defendant retained the plaintiffs as attorneys, and the services sued for were performed under such retainer, the defendant can not in the first instance require plaintiffs to prove a regular license. The presumption is against the defendant. It lies with the defendant to show that plaintiffs had no license. *McPherson v. Cheadell*, 24 Wend. (N. Y.) 24.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

This is a suit brought by appellees Fifer & Barry, attorneys at law, practicing at Bloomington, Illinois, against the appellant, National Home Building and Loan Association, in assumpsit, on the common counts, damages \$5,000. They seek to recover the value of services alleged to have been rendered by appellees, as attorneys, and expenses incurred by them in defending for appellant a suit instituted in the McLean Circuit Court, on the 18th day of January, 1896, by the People of the State of Illinois ex rel. David Gore, Auditor Public Accounts, v. National Home Building and Loan Association, for the dissolution of said corporation and the appointment of a receiver for it; said suit being brought under the statute of Illinois, making it the duty of the auditor to examine this class of associations periodically, and if he finds their assets insufficient to justify a continuance of business by them, or that they are guilty of

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illegal practices, after giving sixty days' notice to the association to correct the practices complained of, or make good their assets, to report the same to the attorney general, whose duty it becomes to institute proceedings of the character named. Appellees were retained by appellant, with their regular and general attorney, in the defense of said suit.

Notice was served on appellant on the 17th day of January, 1896, by the attorney general, that on the day following he would file the suit above indicated. The bill was filed in pursuance of the notice. A demurrer by appellant to that part of the bill charging illegal practices and to a part of the same charging insolvency, and a plea to the remaining portion of the bill charging insolvency, were filed, and one week after the filing of the bill the questions arising on the bill, demurrer and plea were argued before the Circuit Court, and by agreement of counsel all the questions being argued as though raised by demurrer; and on February 4, 1896, demurrer was sustained. The attorney general took an appeal to the Supreme Court, and in the early part of June, 1896, an oral argument was made in that court, appellant's three solicitors all taking part. A printed brief and argument was also filed in the Supreme Court in that case, by all the solicitors of appellant.

At the time appellant employed appellees as attorneys to defend it in said proceedings, no special amount was agreed upon as pay for their services and charges in defending the same; but appellees promised at the time that their fees and charges would be reasonable.

On the trial of this case in the court below, it appears from the evidence that the assets of appellant, when said bill was filed against it, amounted to about \$1,260,000. Upon a trial of this case by jury in the court below, a verdict was returned for appellees, and their damages assessed at \$2,800, and after hearing a motion for a new trial, made by appellant, the court below denied said motion and gave appellees judgment on the verdict and for costs.

From that judgment appellant brings this case to this

court by appeal, and urges that said judgment ought to be reversed. First, because the court below erred in overruling its motion for a continuance. We have carefully examined the affidavit presented to the court in support of the motion for a continuance, and find that appellant did not show in said affidavit, that diligence in trying to procure the attendance of the two absent witnesses that the law requires should be shown, in order to entitle it to a continuance on account of the absence of said witnesses. The second reason urged by appellant why the judgment below should be reversed is because the court should have given the jury the fifth instruction requested by it. Said instruction is as follows:

"5. The plaintiffs are bound to establish by a fair preponderance of the evidence in this case, that they are licensed to practice law in the State of Illinois, and unless you shall find that such fact has been established by plaintiffs by a fair preponderance of the evidence, than it is your duty to find for the defendant."

We think the court below did not err in refusing said instruction, because there was uncontradicted evidence that appellees had expended some money in and about defending said case for appellant, which they were entitled to recover, which would have made it error to instruct the jury to find for the appellant if appellees had failed to prove they were licensed to practice law in Illinois. This refused instruction was the only way in which appellants, in the court below, sought to get a ruling of that court on the question of the necessity for appellees to prove that they were licensed to practice law in Illinois before they could recover in this case for the services rendered to appellant as attorneys, that we can notice under this contention. We think, in view of the fact that Governor Fifer, one of the appellees, testified that he was a practicing lawyer at the Bloomington bar; was admitted to this bar in the spring of 1869; had been in some of the heaviest litigations, in the Circuit, the Appellate, and the Supreme Courts of this State. And Edward Barry, the other of the appellees, tes-

tified that he was a practicing lawyer, and a partner of Governor Fifer, practicing law at Bloomington; had been general attorney for the Equitable Loan Association of said city for three or four years; together with the fact that appellants offered no evidence that appellees were not licensed attorneys in this State, and as our Supreme Court held in the case of *Luther N. Ferris et al. v. Commercial National Bank*, 158 Ill. 237, that the courts will take judicial notice of who are regularly licensed attorneys at the bar of this State, that we are justified in saying there is no merit in appellant's contention that we should reverse the judgment for want of proof in this record that appellees were not shown, by proper evidence on the trial in the court below, to have been licensed to practice law in this State.

Appellant urges as a third reason why this judgment should be reversed, that "The court below erred in admitting evidence on the trial in behalf of appellees, and in giving instructions to the jury in behalf of appellees as to reasonable value of appellees' services as attorneys, when it did not appear that there was no usual or customary charges for such, or like services." We find by examination of the evidence referred to in this case, that while the inquiry in the court below might have been by proper objections made to the court, by appellant, specifically confined to what were the usual and customary fees paid at Bloomington, Illinois, to attorneys for similar services as those shown to have been rendered by appellees to appellant—if there was there such usual and customary fees charged—yet, since appellant made no such specific objection in the court below, to questions put to appellee's witnesses as to what the legal services rendered by appellees to appellant were reasonably worth, but contented itself by only urging a general objection to such questions, it can not be heard to complain for the first time in this court, that the trial court did not confine appellees to showing what was the usual fees charged and paid at Bloomington, Illinois, for similar legal services. The fact is, that appellees, in this case brought themselves within the rule in such cases, as is established in the case of

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L. N. A. & C. Ry. Co. v. Wallace, 136 Ill. 87. As to the instructions of the court given to the jury at the request of appellees, informing the jury that they might, in fixing the amount of damages that appellees have sustained, if any, allow them whatever they believed from the evidence that said services were reasonably worth, being erroneous; we will say, that these instructions do not contain reversible error, because they fit the evidence which was given in behalf of both appellees and appellant, without objection from either side; hence neither ought to complain here.

Finally appellant insists that the damages awarded to appellees by this judgment are excessive, and for that reason we ought to reverse the judgment.

But we think the amount that should be paid to appellees for their charges and services in defending appellant, as its solicitors in the case in question, where no amount was fixed by the parties when the contract of employment was made, was wholly a question of fact for the jury and trial judge to determine, and we can not see in this record that the amount determined by them, is so grossly excessive as to warrant us in reversing their findings on that account. Therefore, after a patient and careful consideration of all the many errors assigned by appellant why this judgment should be reversed, we have concluded that there were no reversible errors committed in the court below, and that the result reached in that court in this case is a fair disposition of the matters in issue between the parties to this record. We therefore affirm the judgment.

Judgment affirmed.

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1. *ALIMONY—Effect of Being in Contempt of Decree.*—A court of equity may properly deny the relief prayed for in a petition to vacate a decree for the payment of alimony until the petitioner has paid up all alimony due under such decree or by his petition has offered to show facts that would render him unable to do so.

2. *SAME—Not Changed on Account of Facts Existing when Decree was*

Rendered.—In the absence of fraud in procuring the decree, a court at a subsequent term is powerless to alter or modify an allowance of alimony in a decree for divorce upon the conditions existing at the time the decree was entered.

8. *EQUITY PLEADING—Facts Constituting Fraud Should be Stated.*—A petition to vacate an allowance of alimony alleged that the defendant had fraudulently concealed from the plaintiff that she had committed adultery before the decree was entered and after the marriage, but set up no facts constituting the fraudulent concealment. *Held*, that a demurrer to the petition was properly sustained.

4. *BILLS OF REVIEW—On Account of Newly-Discovered Evidence—Diligence.*—A bill of review may be brought upon the discovery of new matter, but the matter must be not only new, but such that the party could not by the use of proper diligence have known of it before the former hearing, and diligence in this regard must be averred and proven before a court will vacate a decree entered at a prior term.

Petition, for modification of decree allowing alimony. Appeal from the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

HAMILTON & WOODS, attorneys for appellant.

Alimony decrees are usually subject to modification and the control of the court even after final decree and after the term at which they were rendered. Works on Courts & Jur. 516; Ewing v. Ewing, 24 Ind. 468; Ex parte Cottrell, 59 Cal. 417.

Almost all the States have some statutory provision giving courts power to change decrees for alimony, but they vary greatly in the terms used. Some are only declaratory of the common law, as in Iowa; while in our own State, and in many others, the power is much broader. Chap. 40, Sec. 18, R. S. 1874, gives the court "ample power to declare the termination of all alimony," in a proper case, as was held in Lennahan v. O'Keefe, 107 Ill. 625, and in Cole v. Cole, 142 Ill. 23.

Alimony is an allowance for the nourishment of the wife, resting in discretion, variable and revocable. It is therefore essentially temporary, conditional and dependent. And a judgment for alimony upon divorce, whether *a vinculo* or *a mensa et a thoro*, remains under the statute, as it

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did in the ecclesiastical courts, "subject to the continuing authority of the court over it to be exercised from time to time." Bacon v. Bacon, 43 Wis. 203.

Under a statute similar to ours, the court in Wisconsin held that the tribunal which decrees a divorce can not by any form of judgment then rendered with reference to alimony, deprive itself of the authority given it by statute to revise such judgment. Campbell v. Campbell, 37 Wis. 219; Coad v. Coad, 41 Wis. 23; Thomas v. Thomas, 41 Wis. 229; Guenther v. Jacobs, 44 Wis. 354; Kempster v. Evans, 81 Wis. 253.

J. F. CARBOTT, attorney for appellee.

The jurisdiction of the court over alimony is statutory, and can not be extended beyond the statute authority. Perkins v. Perkins, 16 Mich. 162.

Alimony is measured by needs of wife and ability of husband. Provision should, so far as possible, make a sure reliance for wife. Wheeler v. Wheeler, 18 Ill. 39.

Allowance of alimony is discretionary with trial court in view of all the circumstances. Jolliff v. Jolliff, 32 Ill. 527.

The chancellor who renders a decree for divorce and alimony, has knowledge of the parties and their differences and contentions and of a variety of circumstances which an Appellate Court can not so well know and has superior advantage to determine justly between them as to alimony. Craig v. Craig, 64 Ill. App. 48; Graves v. Graves, 108 Mass. 314; Ayres v. Ayres, 142 Ill. 374; Umlauf v. Umlauf, 27 Ill. App. 375.

In making any order respecting alimony, the court takes into consideration the property and capacity, or, in the phrase of the English ecclesiastical courts, "the faculties" of the husband at the time, although acquired since the original decree. Graves v. Graves, 108 Mass. 314.

The original decree for divorce and alimony, rendered January 6, 1896, is *res judicata* as to all matters existing at the time it was rendered. The estoppel extends to all matters properly before the court which the parties might

have litigated. *Petersine v. Thomas*, 28 Ohio St. 596; *Cole v. Cole*, 142 Ill. 19; 2 Nelson on Div. and Separation, Sec. 934; 2 Bishop on Marr. and Div., Sec. 429.

The right to alimony having been once adjudicated by the court, the only inquiry was as to the ability of appellant to pay it. *Alexander v. Alexander*, 20 D. C. 552, 20 Wash. L. Rep. 443.

The amended petition filed herein makes no attempt to show a change in the pecuniary condition of the parties or the inability of the appellant to pay said alimony, and therefore the appellant, as to alimony, is bound by the decree. A petition which does not aver a changed condition of the parties, is demurrable. *Reid v. Reid*, 74 Iowa, 681.

An order allowing temporary alimony in a proceeding in which the petition alleges no change of circumstances, is erroneous. *Blythe v. Blythe*, 25 Iowa, 266.

"The court should be very slow, under any circumstances, to revise or alter the former decree, and the application for the modification of an allowance should not be granted unless it appears that the changed circumstances of the parties render the modification necessary." 2 Amer. and Eng. Enc. of Law (2d Ed.) 137; *Foote v. Foote*, 22 Ill. 425; *Johnson v. Johnson*, 125 Ill. 520.

The change of circumstances must have occurred since the original decree. *Reid v. Reid*, 74 Iowa, 681.

Change of allowance of alimony at a subsequent term will not be made on facts existing at the time of the decree. *Cole v. Cole*, 142 Ill. 19.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

On June 4, 1895, John M. Daugherty, the appellant, filed his bill in the Circuit Court of Adams County, Illinois, against Ella Daugherty, the appellee, charging that they were married on June 3, 1874, and thereafter lived together as husband and wife until April 1, 1892, at which time she willfully deserted him, without any reasonable cause, and for more than two years thereafter, and before the filing of

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said bill, had continued such desertion; and praying for a decree of divorce. The cause was continued to the October term, 1895, of said court for want of service.

On November 4, 1895, appellee filed her answer, admitting substantially all the averments of said bill, except the said two years of willful desertion without any reasonable cause, which averment she denied.

On November 8, 1895, appellant filed his general replication to said answer.

On January 6, 1896, at said October term, 1895, a hearing was had and a decree rendered in said cause, finding all the material averments of said bill to be true; that appellee was guilty of desertion in manner and form as charged; granting a divorce under said bill; but ordering appellant to pay to appellee alimony in the sum of \$200 during each year, "until the further order of this (Circuit) Court, commencing on the first day of January, 1896, and payable quarterly in advance until the further order of the court." On January 11, 1896, said Circuit Court for said October term, 1895, adjourned *sine die*.

On April 8, 1896, at the March term, 1896, of said court, on petition and motion of appellee, the said cause was redocketed, and appellee obtained an order of said court upon appellant to show cause why he should not be attached for contempt in failing to pay the installment of alimony, under said decree due April 1, 1896. Appellant, on April 9, 1896, answering said order for cause, showed that after the adjournment of said court, at the term during which the said final decree for divorce and alimony was rendered, he had learned of the adultery by appellee, committed before said decree was made and of which he was, at the time of the hearing of said divorce case ignorant; and that he has not paid the installment of alimony becoming due April 1, 1896, for the reason that he understood that the proof of such adultery would be a good reason for the termination of such alimony. At the same time, appellant filed a petition for a modification and annulment of said decree, with respect to alimony.

On May 14, 1896, said cause was continued to the June term, 1896. At said June term leave was given to appellant to amend said petition for a modification of the alimony decree, which amendment was made. At the same term, leave was given to appellant to amend his amended petition aforesaid, and on July 13, 1896, the said court adjourned *sine die*.

On October 15, 1896, appellant filed his secondly amended petition for modification of said alimony decree, showing the marriage, the decree of divorce and alimony as aforesaid; that appellant had \$2,000 less property than when he married appellee, and had obtained no property from her, as a result of said marriage, either as joint accumulation or otherwise; that no evidence, proving or tending to prove, that appellant had obtained any property from appellee in any way was ever offered upon the hearing, at which said decree was rendered, nor was it even claimed or pretended by or on behalf of appellee, upon such hearing that such was the fact; that after said marriage and before said decree, appellee had committed adultery with one Samuel Daugherty on at least two occasions, as shown by affidavits of Barney Wyatt and of William D. McKenzie; all of which was carefully concealed from appellant until some time in March, 1896, and long after the adjournment of said court, at the term during which said decree was rendered; that until long after the adjournment of said court, at the term last aforesaid, appellant, in good faith, believed that appellee was a good, pure and virtuous woman; that no proof was offered upon said hearing, proving or tending to prove any adultery by appellee, nor did appellant have even an intimation that she was guilty of adultery until the term of said court, at which the hearing occurred, was long past; and praying for an order of said court modifying the said decree, with respect to alimony.

On November 7, 1896, appellee demurred to said secondly amended petition, for want of equity therein, which the court on January 5, 1897, sustained, and denied the relief prayed for, dismissed the secondly amended petition out of

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said court, and adjudged the costs in that behalf against appellant. From that decree appellant prayed and was allowed an appeal to this court.

ERRORS ASSIGNED.

1. "The court erred in sustaining the demurrer of said defendant to the said secondly amended petition of said petitioner for modification of alimony, and in denying the relief therein prayed, and in dismissing the said secondly amended petition."

2. "The court erred in not overruling the demurrer of said defendant to the said secondly amended petition of said petitioner, for modification of alimony, and in not granting the relief prayed for in said secondly amended petition."

3. "The court erred in entering and rendering the said decree, and in sustaining, and in not overruling, the said demurrer of said defendant to the secondly amended petition for modification for alimony aforesaid, and in denying, and in not granting, the relief in manner and form as prayed in said secondly amended petition, and in dismissing the said secondly amended petition, and in adjudging that the said petitioner should pay the costs in that behalf."

The order and decree appealed from in this case was made as a result of a proceeding instituted in the court below by appellee to compel appellant to pay an installment of alimony due from him on April 1, 1896, as provided in a decree of divorce between these parties rendered at a former term of that court, said decree having been procured upon the application of appellant; and while it does not appear, in the petition of appellant demurred to, that appellant had not paid this installment of alimony due April 1, 1896, yet it does appear in his answer, filed to the order of court to show cause, etc., that he was in default in its payment; therefore it was not error in the court below to deny him relief, on his petition to vacate so much of said decree as provided for the payment of alimony, until he had paid up all alimony due under said decree, or by his petition offer to show facts that would render him unable to pay same. *Cole v. Littledale*, Adm'r, 164 Ill. 630. In the recent case of

Craig v. Craig, 163 Ill., at page 181, the court says: "The statute (Chap. 40, Sec. 18) provides that where a divorce has been decreed, the court may, on application, from time to time make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall seem reasonable and proper. The statute does not prescribe in what manner the application for alterations in the decree shall be made; ordinarily it would be by petition. * * * It is not, however, indispensable that there should be a formal application therefor by petition. Upon a petition of a beneficiary under a decree for the equitable assistance of the court in the collection of alimony, the whole subject-matter of such alimony is sufficiently submitted to the court to authorize it to make changes in regard to prospective alimony, if it finds that the circumstances of the parties and the nature of the case have so changed as that there should be some modification in the decree for alimony, in order to make it fit, reasonable and just. It is true that here the defendant was in contempt of court in not paying the installments of alimony in conformity with the requirements of the decree. Wightman v. Wightman, 45 Ill. 167; O'Callaghan v. O'Callaghan, 69 Ill. 552. It may well be that for that reason it would not have been error, even if there had been a formal petition and application for a reduction of alimony, to have denied such application on that ground alone, and especially in the absence of any showing of pecuniary inability. In Cole v. Cole, 142 Ill. 19, it was said of the appellant that he did not come into court with clean hands, and would not be permitted to ask relief for a decree of which he was in contempt."

In appellant's said petition to vacate the allowance of alimony both accrued and to accrue, no change in the circumstances of himself or appellee is averred since said decree was entered; at most, he only claims: First. She fraudulently concealed from him that she had, before the decree was entered, and after her marriage with him, committed adultery. Second. That he had no knowledge of

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said alleged adultery of his wife, before or at the time said decree was entered, nor at that time did he know by whom he could prove such adultery, but that after the court that made the decree had adjourned, he discovered that his wife had committed adultery at the time he mentioned in his petition, and also discovered the witnesses by whom he could prove it. The action of the lower court herein, as against the claim of appellant first above stated, was correct, because no facts constituting the fraudulent concealment are averred in his petition, and further, appellant procured the decree sought to be partially vacated, not appellee. *Rae v. Hulbert et al.*, 17 Ill. 572; *Boyden et al. v. Reed*, 55 Ill. 458. As to appellant's second above claim we will say, his said petition does not show he used proper diligence in obtaining the knowledge of adultery, or the witnesses by whom he could prove the same. Diligence in this regard must be averred and proven, before a court would vacate a decree entered at a prior term, for newly-discovered facts, and witnesses to prove them. *Boyden et al. v. Reed*, *supra*.

Finally, we are compelled to hold under the ruling of our Supreme Court, in the case of *Cole v. Cole*, 142 Ill. 19, that as to conditions existing at the time the decree was entered, the court at a subsequent term is powerless to alter or modify the allowance of alimony in decree for divorce, in the absence of fraud in procuring the decree. Even though, in some other States, their courts of last resort may with apparent soundness hold otherwise.

The petition of appellant was therefore properly dismissed by the court below, and its order and decree herein will be affirmed, with costs to appellant.

Guerdon Kimball v. Sanford A. Walker et al.

1. REAL ESTATE—*Rent to Accrue is Transferred by a Warranty by Deed.*—Rent to accrue to the owner of land, is, the execution of a warranty deed for such land, transferred to the grantee in such deed.

2. *SAME*—*Certain Transactions Held to Amount to a Severance of Rent.*—A leased certain land to B, who agreed to make a note for the rent to C. The note was signed by B but was not delivered until after his death. After the delivery of the note A executed a warrantee deed for the land to D. On bill of interpleader by B's administrator against C and D, *it was held* that the facts stated operated to effect a severance of the rent so that it would not pass by the deed, but was merged into the note which was payable to C, and that he or his assignee were entitled to receive payment thereof.

Bill of Interpleader.—Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

NEAL & WILEY, attorneys for appellant.

Rent to accrue is part of the realty, and passes as such with the reversion. Taylor's Landlord and Tenant, 3d Ed., Sec. 447; 1 Washburn on Real Property, 340; 2 Washburn on Real Property, 3-6; 12 Am. and Eng. Ency. 754; Crosby v. Loap, 13 Ill. 625; Green v. Massie, 13 Ill. 363; Dixon v. Niccolls, 39 Ill. 372; LeMoyne v. Harding, 132 Ill. 23; Disselhorst v. Cadogan, 21 Ill. App. 180; Johnson v. Smith, 24 Am. Dec. 339; Evans v. Hamrick, 100 Am. Dec. 595.

Being an interest in land this rent could not be assigned except by some instrument in writing. R. S., Chap. 59, Sec. 2.

A delivery of a note is necessary to its validity. Foy v. Blackstone, 31 Ill. 538; Hunt et al. v. Weir, 29 Ill. 83; Hinterberger v. Weindler, 2 Brad. 410; First National Bank v. Strang, 72 Ill. 559; 1 Wait's Actions and Defenses, 565; Wilson v. Keller, 9 Brad. 347; Telford v. Patton, 144 Ill. 620.

It is essential to a donation *inter vivos* that the gift be absolute and irrevocable; that the giver part with all present and future dominion over the property given; that the gift go into effect at once and not at some future time; that there be a delivery of the thing given to the donee; that there be such a change of possession as to put it out of the power of the giver to repossess himself of the thing given. Telford v. Patton, 144 Ill. 620; 1 Parsons on Contracts,

Kimball v. Walker.

marginal page 234; Grover v. Grover, 24 Pick. 261; Wilson v. Keller, 9 Brad. 347; Blanchard v. Williamson, 70 Ill. 647; Badgley v. Votrain, 68 Ill. 25; 3 Wait's Actions and Defenses, 488; Reed v. Spaulding, 42 N. H. 114.

If the thing given be a chose in action the law requires an assignment or some equivalent instrument, and the transfer must be actually executed. Wilson v. Keller, *supra*.

When a husband receives his wife's money the presumption is that he receives it as agent of the wife. Bartlett v. Wright, 29 Ill. App. 339; Patten v. Patten, 75 Ill. 451; Tomlinson v. Matthews, 98 Ill. 178.

HUGHES & HAYES, attorneys for appellee.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

On December 4, 1896, one John Long, administrator of the estate of W. F. Johnson, deceased, filed in the Circuit Court of Coles County, Illinois, a bill of interpleader against Sanford A. Walker and Guerdon Kimball, which was afterward, and before the hearing in said court, amended by making one George P. Walker also a party defendant. Said Long, administrator, etc., by his bill sets up that there is due from said estate, to be paid in due course of administration, the sum of \$275, representing the rent for the year 1894, of eighty acres of land, formerly owned by Amanda Walker, which rent is evidenced by a promissory note for \$275, due December 25, 1894, payable to said Sanford A. Walker, and signed by said W. F. Johnson and one B. F. Cutler. That said sum of \$275 is claimed by said Walker and Kimball each, and to avoid litigation he asks that said Walker and Kimball be summoned to answer his bill, and that the court determine and decree to whom said \$275 should be allowed and paid as a claim against said estate. The said Walker and Kimball both answered said bill, and upon trial, had the court below decreed that said George P. Walker was entitled to have the claim of \$275 in question, allowed to him against said estate, to be paid in due course of administration.

From this decree, Guerdon Kimball prayed an appeal to this court. The facts disclosed by this record, appear to be as follows: One Amanda Walker, the wife of said Sanford A. Walker, being the owner of 80 acres of land in Coles county, Illinois, leased the same in the winter of 1893 and 1894, to one W. F. Johnson, for a term of one year, commencing March 1, 1894, and ending March 1, 1895. For the rent of which term, said Johnson agreed at the time of the leasing, by the express direction of the owner to give a note for \$275 payable December 25, 1894, to Sanford A. Walker, the husband of the owner of the land. Under this agreement and leasing, Johnson went into possession of the eighty acres, and died in July, 1894, before the note agreed to be given for the rent of said land was actually delivered to Sanford A. Walker, but before his (Johnson's) death, a promissory note for \$275 payable to Sanford A. Walker and due December 25, 1894, signed by W. F. Johnson and B. F. Cutler, was executed, and after the death of W. F. Johnson, about July, 1894, was, by the widow of W. F. Johnson, delivered to Sanford A. Walker. In June, 1894, Sanford A. Walker, for a valuable consideration, sold said note to his father, the said George P. Walker. On September 24, 1894, by warrantee deed in the usual form, the said Amanda Walker and her husband conveyed said eighty acres of land to Guerdon Kimball, the appellant, who contends that this \$275, as rent not yet due, passed to him by said deed; while George P. Walker, one of the appellees, contends it is due to him, as assignee of the payee of the note given for said rent, he having paid full value therefor.

There is no doubt but that if on September 24, 1894, this \$275 was rent partially accrued and to accrue to Amanda Walker, when she and her husband delivered their said warrantee deed to appellant for said land, then this decree is erroneous, and ought to be reversed, because it would pass to appellant as the grantee in said deed. But as we view it in a court of equity, where that will be considered done that the parties intended should be done, as this land was leased to W. F. Johnson, and he agreed to give his note for

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this rent, and the note was in fact given, before this deed was made, we must treat this as a severance of the rent, so that it would not pass by the said deed; the rent for said term being merged into the note, which was, by its terms payable to, and by gift the property of Sanford A. Walker, and as he, before said warrantee deed was made, for a valuable consideration, sold said note to appellee George P. Walker, then he, George P. Walker, in equity and good conscience, should have this \$275.

Hence, we think, the Circuit Court made the proper decree herein, and we therefore affirm it.

Decree affirmed.

William Wetz v. Sibella Greffe.

1. *COSTS—Allowing a Plaintiff to Prosecute as a Poor Person is in the Discretion of the Trial Court.*—The matter of permitting a plaintiff to prosecute his suit as a poor person, is left by the express terms of the statute to the judicial discretion of the court where the suit is pending, and in this case the court holds that there was no abuse of that discretion.

2. *PRACTICE—Going to Trial Without Issue on the Plea is a Waiver of a Formal Issue.*—Proceeding to trial without issue being made up on the pleas is a waiver of a formal issue, and the irregularity will be cured by verdict.

3. *TRIALS—When Instruction to Find for the Defendant is Proper.*—An instruction taking a case from the jury and directing a verdict for the defendant should only be given when the evidence with all the legitimate and natural inferences to be drawn therefrom is wholly insufficient if credited, to sustain a verdict for the plaintiff.

4. *LIMITATIONS—New Promise Made to Agent Removes Bar.*—An unqualified admission that a debt is due coupled with a promise to pay it, made to an agent of the creditor is sufficient to remove the bar of the statute of limitations.

5. *NEW TRIALS—Motion for on Account of Newly-Discovered Evidence Held Properly Refused.*—As the newly-discovered evidence relied on in this case as ground for a new trial, is merely cumulative and not conclusive of the issue, and as the appellant did not show the exercise of proper diligence in attempting to produce it on the first trial, the motion for a new trial was properly refused.

Assumpsit, on the common counts. Appeal from the Circuit Court of Christian County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

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Wetz v. Greffe.

Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

JOHN E. HOGAN and JAMES L. DRENNAN, attorneys for appellant.

JAMES B. ABRAMS and LYMAN G. GRUNDY, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This suit was brought by Sibella Greffe against William Wetz to recover for money she claimed to have sent him from Germany in 1869.

A trial was had in the Circuit Court by a jury and verdict returned in favor of appellee for \$117. Judgment was rendered upon the verdict, and the case brought to this court by appellant.

It is claimed by appellant that the court below erred in allowing appellee to prosecute her suit without requiring her to give a bond for costs. Appellant had filed an affidavit and entered his motion to rule appellee to give a bond for costs, on the grounds of her insolvency. She filed a cross-motion asking leave to prosecute her suit as a poor person. The record discloses the fact that these motions came up and were heard together. The court allowed the cross-motion and permitted appellee to prosecute her suit as a poor person. From the affidavit filed by appellant it appeared that appellee was insolvent. This affidavit was considered by the court in determining the cross-motion. The matter of permitting a plaintiff to prosecute his suit as a poor person, is left by the express terms of the statute to the judicial discretion of the court where such suit is commenced or pending. *Chicago & I. R. R. Co. v. Lane*, 130 Ill. 116. There was no abuse of the exercise of this discretion by the court in permitting appellee to prosecute her suit as a poor person.

It is further claimed the court erred in proceeding with the trial without issue being joined on the pleas of the statute of limitations and payment. The case was tried

precisely the same as if replications had been filed to these pleas, and issue formally joined, appellant made no objection to proceeding to trial as the pleadings were. He might have taken a rule on appellee to reply, or prayed judgment against appellee for want of a replication to the pleas. This he did not do. It is now the settled doctrine in this State that proceeding to trial on issue not being made up on the pleas, it is considered as waived, or the irregularity cured by verdict. *Strohm v. Hayes*, 70 Ill. 41; *Barnett v. Graff*, 52 Ill. 170; *Ross et al. v. Reddick*, 1 Scam. 73.

The court was justified in refusing to give appellant's instruction directing the jury to find a verdict for him. This should only be given when the evidence with all the legitimate and natural inferences to be drawn therefrom is wholly insufficient, if credited, to sustain a verdict for plaintiff. *Street R. R. Co. v. Boyd*, 156 Ill. 416; *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59. The evidence with proper instructions was submitted to the jury, and the verdict was for appellee. This finding is sustained by the evidence.

It is conceded that appellant received from appellee before she came to this country, in 1869, \$217. The money was sent by appellee's husband to appellant. It is by appellee admitted that appellant sent her \$22 while she was in Chicago soon after she came to this country. That subsequently he bought a shoe shop for her husband for \$75, and furnished her two sacks of flour worth \$3, making in all \$100, and this is all that he paid her. As to whether the appellant paid or settled the balance, \$117, with her, the evidence is conflicting. The trial judge and the jury heard the witnesses testify in court, observed their manner on the witness stand, and gave credence to the testimony of appellee and her witnesses, and we are not disposed to disturb the finding of the jury and the court.

It is urged by appellant that the claim sued on is barred by the five year statute of limitations. In reply to this contention, the appellee sets up that appellant made a new promise to pay this debt within five years before the commencement of this suit.

Some twelve years ago, it appears from the evidence, appellee and one Jacob Rotleberger went to see appellant about the money he borrowed from her in the old country. In the conversation they had at that time, he told her to turn round and go home, and he would send her a check on the Girard Bank the next day. After this, and about three years before the commencement of his suit, it appears from the evidence that appellee sent her two sons, Charles and Peter Greffe, and one Fitz to appellant to get the money she had sent him from Germany. In this conversation, Charles told him their mother had sent them out to get some money, and she was looking for that check. He in reply said, "You boys go home, I do not owe you anything. If I pay you, your mother can make me pay it again. I will pay your mother." The only indebtedness existing between the parties, was that for the money the appellee sent appellant from the old country. That this is the indebtedness referred to in the conversations between appellant and appellee's two sons, Charles and Peter Greffe, is quite clear. The promise to pay is express. The admissions are unqualified that the debt is due. The amount is fixed by the amount due of the money sent from the old country, and what was said shows an unqualified willingness and intention to pay it, and this was agreed to by Charles and Peter Greffe, the agents of appellee, and the promise made to them as her agents. *Freeman v. Walker*, 67 Ill. App. 313; *Wachter v. Albee*, Adm'r, 80 Ill. 47; *Keener v. Crull*, 19 Ill. 189; *Ayers v. Richards*, 12 Ill. 147; *Carroll v. Forsyth*, 69 Ill. 127.

The court properly overruled the motion for a new trial on the grounds of the newly discovered evidence of Jacob Houser and Tony Wetz. It is claimed these witnesses were present, and heard the conversation between appellee's two sons, Charles and Peter Greffe, and appellant. The fact that they were present at the time of the conversation, he knew at the time the conversation took place, and before, and at the time of the trial, and from aught that appears in the affidavits, their presence and testimony could have been

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obtained at the trial. This is not exercising the diligence required by the law. The newly discovered evidence is simply cumulative and not conclusive on the issue. *Petefish et al. v. Watkins*, 124 Ill. 384.

There was no error in refusing to grant a new trial on the grounds of newly discovered evidence. Judgment affirmed.

Jasper Dyer v. C. W. Brown and Minerva Brown.

1. PLEADING—*A Plea Held to be in Effect a Plea of Non Detinet.*—A declaration in replevin charged the defendants with the wrongful detention of the property in controversy, to which the defendants pleaded that they were not guilty of the grievances charged against them in plaintiff's declaration. *Held*, that the plea was in effect a plea of *non detinet*.

2. REPLEVIN—*Writ of Retorno Habendo Not Awarded on Plea of Non Detinet.*—A plea of *non detinet* in replevin admits the plaintiff's title to the property and puts in issue the detention only; and in a replevin suit where the only plea is *non detinet*, it is error to find the title to the property in the defendant and to award a writ of *retorno habendo*.

Replevin.—Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 18, 1897.

MEEKER & MEEKER, attorneys for appellant.

MILLS BROS. and COCHRAN & MILLER, attorneys for appellees.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by appellant to recover of appellees a certain plant for handling grain, consisting of an office, scales, dumps, oat bins and corn cribs, situate on the right of way of the Terre Haute & Peoria Railroad Co., in Lovington, Moultrie county, Illinois.

The declaration filed in the case contains but one count,

which charges that the defendants wrongfully detain the property in controversy. To this declaration the defendants filed but one plea, in which they say they are not guilty of the grievances charged against them in plaintiff's declaration. This plea in effect is simply a plea of *non detinet*.

This case was tried by the court, the jury being waived by agreement.

The court found the title of the property in the defendant, and that the plaintiff pay the costs, and awarded to the defendants a writ of *retorno habendo*.

The grievance complained of in the declaration was the detention of property only. The plea of *non detinet* put this only in issue. *Hackett v. Jones*, 34 Ill. App. 562; *Hanford v. Obrecht*, 38 Ill. 493; *Bourke v. Riggs*, 38 Ill. 320; *Underwood v. White*, 45 Ill. 437; *Ingalls v. Bulkley*, 15 Ill. 224.

The court erred in finding the title of the property in the defendants. The plea of *non detinet* admits the title of property in the plaintiff. *Van Namee v. Bradley*, 69 Ill. 299; *Vose et al. v. Hart*, 12 Ill. 378.

There was no plea setting up title to the property in controversy in defendants. The finding of the court can not be broader than the issue, consequently the court erred in finding the title to the property in defendants and in awarding them a writ of *retorno*. *Terhune v. Matson*, 40 Ill. App. 296; *Vose et al. v. Hart*, *supra*; *Hackett v. Jones*, *supra*.

For the errors indicated the judgment of the court below must be reversed and this cause remanded.

H. H. Gladville and W. E. Gladville v. Stephen Richardson.

1. INSTRUCTIONS—*Error Without Injury*.—It appears from the evidence that the verdict in this case is clearly right, and the court declines to disturb it merely for the reason that there is error in the instructions.

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Transcript, from a justice of the peace. Error to the County Court of Moultrie County; the Hon. ISAAC HUDSON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

R. M. PEADRO, attorney for plaintiff in error.

E. A. RICHARDSON, attorney for defendant in error.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This suit was brought by the plaintiffs in error before a justice of the peace of Moultrie county to recover the contract price for boring a well on the premises of the defendant in error. The case was tried by a jury in the justice's court. The finding of the issues by the jury were for the defendant, and judgment was entered upon the verdict. From this judgment the defendant brought the case by appeal to the County Court of Moultrie County. A trial was had in that court by a jury, and the jury, being unable to agree, were discharged. Subsequently another trial was had in the County Court of Moultrie County by a jury, that found the issues for the defendant, and judgment was entered upon the same for the defendant for costs.

The plaintiffs in error bring the case by writ of error to this court.

The plaintiffs in error by the terms of the contract were to bore a well upon the premises of the defendant in error that would furnish plenty of water for his stock and house, use and curb the well, and put in a pump if they got water easily, for which they were to receive \$100, but if in this they failed they were to receive nothing.

The parties substantially agree as to the terms of the contract.

By the terms of the contract the plaintiffs were to sink a well that would supply water sufficient for defendant's stock and household purposes. That in this they failed is clearly established by the evidence. The supply was not sufficient even for household purposes.

It is contended on behalf of plaintiffs that this failure is

due to the fact that the defendant did not use proper tests to procure water, and would not allow them to experiment in that regard. The evidence does not sustain them in either of these contentions. The most that may be said is, that the evidence is somewhat conflicting. The verdict of the two juries indicate with whom the weight of the evidence rests, and we are not disposed to disturb the findings of the jury, notwithstanding all the instructions given on behalf of the defendant save one may be tainted with error, and we affirm the judgment of the court below.

Village of Rossville v. Samuel Cook.

1. PRACTICE—*Trial by the Court—Preserving Questions of Law.*—Where an action is tried by the court without a jury, and the bill of exceptions show no exception to the judgment or motion for a new trial, or any proposition of law submitted, and no question is raised as to rulings on questions of evidence, the record presents no question for this court and the judgment must be affirmed.

2. APPELLATE COURT PRACTICE—*Defects in Bill of Exceptions Not Waived by Trial on the Merits.*—An appellee does not waive defects in the bill of exceptions by joining in error and going to trial on the merits.

Assumpsit, for taxes collected by a tax collector. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

W. B. REDDEN and ALLEN & CHAMBERLIN, attorneys for appellant.

SALMANS & DRAPER, attorneys for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellant to recover of appellee as collector of the town of Ross in Vermilion county, one-half the taxes collected of the taxpayers of the village of Rossville, which lies wholly within the town of Ross, for

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the years 1892 and 1893. The case was tried by the court without the intervention of a jury.

From the view we take of this case, we are compelled to affirm the judgment of the Circuit Court.

The bill of exceptions fails to show any exception taken to the finding of the court or the judgment rendered, or that any motion for a new trial was made, and there was no question of law discussed in argument arising on rulings of the court on admitting or excluding evidence. It does not appear from the bill of exceptions that there were any propositions of law submitted to the court under the 42d Section of the Practice Act, to be *held* or *refused*. This being the case, then there is no question presented by the record upon which we can pass. *Gould v. Howe*, 127 Ill. 251, and cases there cited.

The error complained of in the argument is the finding and judgment entered by the court. To neither of these are any objections and exceptions found in the bill of exceptions. They, not having been thus preserved, appellant will be deemed to have waived the errors complained of.

Appellee by joining in error and going to trial on the merits did not thereby waive the defect in the bill of exceptions. *Martin et al. v. Foulke et al.* 114 Ill. 206; *Gray v. Fuller Electrical Co.*, 20 Ill. App. 670.

The judgment is affirmed.

M. T. Shepherd v. A. R. Royce.

1. **BURDEN OF PROOF**—*Where the Execution of a Note is Denied.*—In a suit on a promissory note a plea denying the execution of the note does not charge the plaintiff with the crime of forgery, and thus put upon the defendant the burden of proving that charge beyond a reasonable doubt; its only effect is to cast upon the plaintiff the burden of proving the execution of the note as at common law.

2. **VERDICTS**—*Sustained by Evidence Should Not be Disturbed.*—The trial judge and the juries before whom this case was tried, heard the witnesses testify and saw their manner upon the witness stand; their

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opportunity for determining the weight to be given to the testimony was greater than that possessed by this court, and as there is evidence sustaining the verdict, it should not be disturbed.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

JOHN R. & WALTER EDEN, attorneys for appellant.

R. M. PEADRO, attorney for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

The only question raised by the pleadings in this case is the execution of the note sued on.

The appellee, the defendant in the court below, filed a plea under oath, denying that the note was his and that it was his signature to it.

The appellant claims, by filing this plea, the appellee charges him with the crime of forgery, and that this charge must be proven by him beyond a reasonable doubt. This contention is not well taken. The only effect of this plea was to cast upon appellant the burden of proving the execution of the note as at common law. *Wallace v. Wallace*, 8 Ill. App. 60.

There is no averment in the plea intimating that the plaintiff was guilty of the crime of forgery.

When, in civil cases, a criminal offense is charged in the pleadings, it has been held the offense charged must be proved beyond a reasonable doubt. *Sprague v. Dodge*, 48 Ill. 142; *McConnel v. The Delaware M. S. Ins. Co. et al.*, 18 Ill. 228.

As there is no criminal offense charged in this case in the pleadings, this rule does not apply. By the pleading appellant was required to make out his case by a preponderance of the evidence.

It is contended by appellant that the verdict of the jury is not sustained by the evidence. There is a conflict in the

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evidence as to whether appellee executed the note or not. One of the methods of determining controverted questions of fact is by trial by jury. Two jury trials have been had in this case, each jury found for appellee. The judge presiding at the last trial denied appellant's motion for a new trial. The trial judge and the juries heard the witnesses testify and saw their manner upon the witness stand. Their opportunities for determining what weight should be given to their testimony was greater than ours, and as there is evidence sustaining the verdict it will be allowed to stand, and the judgment below affirmed.

First National Bank of Springfield, Illinois, v. Georgetta E. Gatton.

1. **MARRIED WOMAN—Husband May Act as Wife's Agent.**—A married woman, who is the owner of valuable property, has a right to use it or the income from it in the support of the family, and may properly employ her husband as her agent to manage her business without subjecting her property to the payment of his debts.

2. **ASSUMPSIT—When Action for Money Had and Received Will Lie.**—An action for money had and received may be maintained whenever the defendant has obtained money of the plaintiff, either directly or through an agent, which in equity and good conscience he ought not to retain. When money has been thus received, the law implies a promise to pay, notwithstanding there was no privity between the parties.

3. **INSTRUCTIONS—Stating Abstract Propositions—Objections Cured.**—While appellee's first instruction announces an abstract proposition of law, it proceeds without any break in the sentence to apply the law to the facts as claimed by appellee, and thus the defect, if any existed, is cured.

Assumpsit, for money had and received. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

PALMER, SHUTT, HAMILL and LESTER, attorneys for appellant.

71	323
172s	625
71	323
84	230

CONNOLLY, MATHER and SNIGG, attorneys for appellee. -

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit brought by appellee to recover of appellant the sum of \$862.28, for which sum judgment was rendered for the former.

In 1892 the appellee borrowed of the Illinois National Bank located at Springfield, Illinois, the sum of \$1,500. At that time her husband, J. N. Gatton, was insolvent. She owned real estate in the vicinity of Springfield, Illinois, of considerable value. The credit was given to her, and she alone signed the note; subsequently, when the note was from time to time renewed, her husband joined with her in the execution of the note. The money thus borrowed was placed in the Illinois National Bank to her credit. This money was to be used in the stock business by her husband, in her name, as her agent, to help support the family, for the benefit of keeping up family expenses. The checks were all signed by her individually, or in her name by her husband as her agent. The husband of appellee reported to her the purchases and sales and what amount of money was realized, and the losses. The losses from the time she commenced business up to the time this controversy commenced, were from \$300 to \$400. She drew on the funds in the bank for the family expenses, and the husband also drew on this account in her name for some of his personal expenses and some wearing apparel, with her knowledge and consent.

The proceeds of sales of stock were always sent to Illinois National Bank, and placed to the credit of appellee, and she kept the pass book that showed her account with the bank. On the 28th of January, 1896, J. N. Gatton shipped from Granite City to Springfield a carload of cattle to his wife, the appellee. Some of these cattle, as the agent of appellee, he sold in Springfield, the balance he shipped to Chicago. From the contract for the shipment of this stock it appears that it was to be shipped "from Granite City to Chicago; shipper Geo. E. Gatton; consignee, Stockmen's

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Live Stock Company. The contract was made out in the name of appellee. The agent of the railroad company at Springfield, for the purpose of getting a through rate, marked the appellee's name out as consignee, and left the name of J. N. Gatton as consignor. This was done by him without authority from appellee. The cattle were shipped to Chicago in the name of J. N. Gatton. They were sold by the Stockmen's Live Stock Company, and the proceeds sent by draft to appellant, without any authority, to be placed to the credit of J. N. Gatton. The appellant applied this money in part liquidation of a debt held by it against J. N. Gatton and one Knox. As soon as it was discovered what had been done, appellee made a demand for the money of appellant, and payment was refused.

That the money procured by appellee of the Illinois National Bank to engage in the stock business was her separate property, is clear. It was obtained upon her individual note. She owned valuable real estate and was solvent. She had a right as to her separate property to use the income from it in the support of the family; she had the right, and it was proper, for her to employ her husband as her agent to manage the business, and especially so as the business necessarily involved the employment of some one for that purpose. *Bennett et al. v. Stout et al.*, 98 Ill. 47; *Bongard v. Core*, 82 Ill. 19.

It is suggested by appellant's counsel that this was an arrangement between appellee and her husband to hinder and delay his creditors. We do not think the evidence sustains this contention. All purchases were made by him, and also all sales, upon consultation, with appellee. The proceeds were deposited to her credit, and drawn out by checks signed in her name, and the business was all kept within her control.

The record in this case fails to disclose any evidence that shows that this arrangement between appellee and her husband to engage in the buying and selling of stock was tainted with fraud, or that there was any gift by the appellee to her husband. The evidence shows the fact to be that there

were no profits in the business; that the losses were between \$300 and \$400, so there are no profits included in the money in controversy in this suit. In this case there is no controversy over the profits. It is not like the case of *Pease v. Barkowsky*, 67 App. 274.

It is apparent from the evidence in this case, that this controversy is with reference to the disposition of the funds derived from the sale of the carload of cattle shipped from Granite City to Chicago by appellee's husband, and that they belonged to her. It is clear that it was not intended these funds should be sent to appellant, and be applied on an indebtedness of J. N. Gatton to the appellant. It makes but little difference who made the mistake, so the person who participated in the mistake and reaped the benefits of it is the one sued. That the appellant knew, when it received the draft for \$862.27 from the Stockmen's Live Stock Co., to be placed to the credit of J. N. Gatton, there was a mistake in sending this remittance to it, there can be but little doubt. The appellee had done no business with appellant since she had been engaged in the stock business. Her husband had done no business with it for quite a number of years, no arrangement had been made by any one that these funds should be sent to appellant. These circumstances would necessarily lead the officers of appellant to believe this remittance came to them by mistake. There is no evidence showing that the appellee or her husband authorized or directed the Stockmen's Live Stock Company to send these funds to appellant. The Stockmen's Live Stock Company acted as the agent of appellee in receiving and selling the cattle shipped from Granite City to Chicago, and in making the remittance to appellant it was acting as her agent, and the appellant is liable to her for money sent to it by her agent by mistake.

It is insisted on the part of appellant that this action for money had and received will not lie in this case, because there is no privity between the parties. To sustain this position they rely on the case of *Town of Rushville v. President, etc., of Rushville*, 39 App. 503, decided by this court. In that

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case the collector of the taxes collected by him for road and bridge purposes within the corporate limits of appellee paid one-half to the treasurer of appellee, and the other half to the treasurer of the highway commissioners of appellee. In that case the appellee claiming that all the money thus collected was by the terms of the charter payable into its treasury, brought suit to recover sum realized by appellant. The money in that case was paid by the collector to appellant. In this case the money was paid by the appellee through her agent to appellant. That case is clearly distinguishable from the one at bar.

“It is the well recognized doctrine, that the action for money had and received, may be maintained, wherever defendant has obtained money of the plaintiff, which in equity and good conscience he has no right to retain. * * * When money has been thus received, the law implies a promise to pay notwithstanding there was no privity between the parties.” *Taylor v. Taylor et al.*, 20 Ill. 650.

The appellant received the money sued for in the case from appellee and has no right to retain it in equity and good conscience.

Appellant claims that the first instruction given on motion of appellee is an abstract proposition of law, and is liable to mislead and confuse the jury. It is true this instruction in the first part announces a proposition of law, but in the same instruction, and without any break in the sentence, except by a semi-colon, this law is applied to the facts as claimed by appellee, thus curing the defect if any existed.

We hold that the jury was fairly instructed as to the law of this case, both as to appellant and the appellee, and as the jury found the facts with the appellee we are not disposed to disturb the judgment of the court below, and the judgment will affirmed.

**H. S. Tenbrook et al. v. James Ellars and John Ellars,
Adm'rs.**

PROMISSORY NOTES—*Certain Individuals Held to be the Makers of a Promissory Note.*—The following note—

“\$350.00.

SADORUS, ILL., July 30, 1891.

One year after date we promise to pay to the order of William Ellars three hundred and fifty dollars, payable at Sadorus, Illinois, with interest at five per cent per annum from date until paid. Value received.

Signed by Trustees of I. O. O. F. Lodge No. 738, of Sadorus.

H. S. TENBROOK,

A. M. GOUDIE,

AARON COX,

H. KELLEY,

BURT BROWN”—

is the note of the individuals signing it and the words trustees of I. O. O. F. Lodge No. 738, of Sadorus, are merely descriptive.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

J. L. RAY and CHARLES F. MANSFIELD, attorneys for appellants.

ROY WRIGHT, attorney for appellees.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit brought by appellees against the appellants upon a promissory note, of which the following is a *hæc verba* copy, as appears from the abstract, viz.:

“\$350.00.

SADORUS, ILL., July 30, 1891.

One year after date we promise to pay to the order of William Ellars three hundred and fifty dollars, payable at Sadorus, Illinois, with interest at five per cent per annum from date until paid. Value received.

Signed by trustees of I. O. O. F. Lodge No. 738, of Sadorus.

H. S. TENBROOK,

A. M. GOUDIE,

AARON COX,

H. KELLEY,

BURT BROWN.”

McLaughlin v. First National Bank of Pana.

The question raised upon the record in this case is whether the appellants are bound in their individual capacity on the note sued on.

From the body of the note the undertaking appears to be a personal one. The language used is "we promise to pay," etc., which indicates a personal liability and is inconsistent with the idea of corporate liability as claimed by appellants. The name of appellants are signed to the note with nothing added showing they signed the instrument in a corporate capacity. On the left-hand corner of the note, and remote from the names of appellants, are these words, letters and figures:

"Signed by trustees of I. O. O. F. Lodge No. 738, of Sadorus."

They are in no way connected with the signatures to the note. Even if they were the court would not take judicial notice that "I. O. O. F." meant "Independent Order of Odd Fellows." This is only descriptive of the persons, and extrinsic evidence can not be admitted to show what the parties intended.

We therefore hold the note sued on is the individual undertaking of appellants. *Powers v. Briggs*, 79 Ill. 493; *The New Market Savings Bank v. Gillet*, 100 Ill. 254; *Little, Adm'r, v. Bailey*, 87 Ill. 239; *Hypes v. Griffin, Adm'r*, 89 Ill. 134; *Scanlan v. Keith*, 102 Ill. 634; *Wagh v. Suter et al.*, 3 Ill. App. 271; *LaSalle National Bank v. Tolu, Rock and Rye Co.*, 14 Ill. App. 141.

The judgment of the court below will be affirmed.

Daniel M. McLaughlin et al., for Use, etc., v. First National Bank of Pana.

1. **BANKS AND BANKING—Effect of Failure by Customer to Question Correctness of Pass Book.**—Where a pass book furnished by a bank to a customer is balanced, and the checks and book returned and no question is raised as to the correctness of the entries in such book, the silence of the customer in this regard amounts to an admission of their correctness, and so stands until overcome by evidence.

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2. FINDING BY THE COURT—*On Conflicting Evidence.*—This court holds that the finding of the court below in this case is sustained by the evidence and free from passion and prejudice, and that under the well-settled rule it is conclusive on this court.

Assumpsit, for a bank balance. Appeal from the Circuit Court of Christian County; the HON. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

J. C. McQUIGG and J. B. RICKS, attorneys for appellants.

J. C. McBRIDE, attorney for appellee.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

The appellee was a corporation organized and doing business under the National Banking Laws at Pana, Illinois. The appellants were engaged in the mercantile business in several towns in the vicinity of Pana, and kept an account with appellee and with one H. M. Schuyler, of Pana. They did business with appellee from the year 1891, to and including the year 1894. The transactions of each year amounted to several thousands of dollars.

The appellants brought suit against the appellee in the Circuit Court of Christian County, claiming it was indebted to them in the sum of \$3,700, which sum was made up of items of sums of money deposited by them and not placed to their credit, double charges of interest, etc.

A jury was waived, and the case tried by the court. The finding of the court was for the appellee, and the case was appealed to this court by appellants.

It appears from the evidence that appellants had a pass book, furnished by the bank, which was frequently returned by them to the bank, and by it balanced, and the checks with the pass book returned to appellants. No question was raised by them as to the correctness of the entries of the debits and credits in this pass book. Their silence in this regard amounts to an admission of their correctness, and it so stands until overcome by the evidence.

There was a contention in the court below as to whether a certain deposit ticket had not been raised from \$99.74 to \$199.74, also as to whether a spurious stamp had not been used. This stamp was introduced in evidence and

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measured in the presence of the trial judge to test its genuineness. The original deposit tickets, the postal cards, the books kept by the parties, the checks and all the exhibits, were introduced in evidence, and the witnesses testified in open court. The trial judge below had a better opportunity to determine with whom the merits of this controversy rests than can be gleaned from the record filed in this case by this court.

It is a well settled rule in this State, when the evidence is conflicting, the verdict of the jury on the finding of the trial court is conclusive on all questions of fact, if not manifestly against the weight of the evidence, or the result of passion or prejudice.

We hold that the finding of the court below is sustained by the weight of the evidence and free from passion and prejudice. We therefore affirm the judgment of the court below.

Granville Wheelberger et al. v. C. H. Knights et al.

1. **DECREE**—*Evidence to Support Must be Preserved, or the Necessary Facts Must Be Recited.*—It devolves upon a party in whose favor a decree is rendered, to see that the evidence in the case is preserved, or the decree itself must find that specific facts were proven which will sustain it.

2. **SAME**—*When Final.*—A decree is final which disposes of the whole merits of the case, and the mere fact that some things remain to be done, does not make it interlocutory.

Bill, to determine the title to a fund. Error to the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 18, 1897.

DANIEL ABBOTT and JOHN A. GRAY, attorneys for plaintiffs in error.

“It is not the duty of the party against whom the decree is rendered to preserve the evidence. On the contrary, it devolves upon the party in whose favor the decree is rendered to preserve the evidence that will sustain the decree, or the decree itself must find that facts were proven which

will sustain it." *Axtell v. Pulsifer*, 155 Ill. 141; *Jackson et al. v. Sackett et al.*, 146 Ill. 655; *First National Bank v. Baker*, 161 Ill. 283.

"In chancery cases, unlike a case at law, the rule is that the party who asks relief and obtains it must preserve in the decree or otherwise in the record, evidence of facts found sufficient to support the decree, otherwise the decree will be reversed in the Appellate Court." *Alexander v. Alexander*, 45 Ill. App. 213; *Brechon v. Duis*, 39 Ill. App. 259; *Wistar v. Herting et al.*, 27 Ill. App. 443; *Gage v. Eggleston*, 26 Ill. App. 599.

CLARK VARNUM, attorney for defendants in error.

The true test as to whether a decree is a final decree from which an appeal will lie or writ of error may be sued out, or merely interlocutory, from which an appeal will not lie, is whether something still remains to be done by the court. *Hill's Ex'rs v. Fox's Adm'rs*, 10 Leigh. 587; *Hays v. May's Heirs*, 1 J. J. Marsh, 497; *Cocke's Adm'rs v. Gilpin*, 1 Rob. (Va.) 20; *Beebe v. Russell*, 19 How. (U. S.) 285; *Turner v. Plowden*, 5 G. & J. 52; *Ware v. Richardson*, 3 Md. 505; *Perkins v. Sierra, etc., Co.*, 10 Nev. 405.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

This case is brought to this court by Charles H. Martin and John A. Gray by writ of error to the Circuit Court of Fulton County to reverse a decree entered in the case against them.

The error complained of is, there is no evidence in the record or the findings by the court of facts from the evidence upon which the decree can be sustained, so far as it applies to the plaintiffs in error, Charles H. Martin and John A. Gray.

There is no certificate of evidence or depositions on file in the case. The only recitals in the record with reference to the hearing is that entered on the 18th day of December, 1895, which was, "and now this day this cause comes on for hearing on the bill, answer and replication filed herein," and the recital in the decree that "this cause which had hereto-

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fore, to wit, at the December term, 1895, of said court been tried and submitted to the court, came on before the court for final decree. It does not appear from either of these recitals, that any evidence was heard or introduced, oral or documentary, upon the hearing. Hence, to sustain the decree, the decree must find specific facts that were proved on the hearing. *Marvin v. Collins*, 98 Ill. 510. It devolves upon the party in whose favor the decree is rendered to preserve evidence that will sustain the decree, or the decree itself must find that facts were proven which will sustain it. *Axtell v. Pulsifer*, 155 Ill. 141; *Jackson et al. v. Sackett et al.*, 146 Ill. 655. It is not necessary that the evidence should be set out in the decree, the facts established by the evidence is all that is required. *Allen v. LeMoyné et al.*, 102 Ill. 25. There is not a single fact in the findings in the decree that it appears was founded on the evidence introduced on the hearing. In fact it does not appear that any evidence was introduced or heard on the hearing. The recitals in the decree must show they are based on the evidence. This the decree in this case fails to do.

The next error complained of is that by the decree, judgment was entered in favor of defendants in error and against the plaintiffs in error, John A. Gray and Charles H. Martin, for the sum of \$554.05, in case Levi Donnelly failed to pay that sum to defendants in error.

It nowhere in the record in this case appears how or for what these plaintiffs in error were or became indebted to defendants in error, or that they had any funds that belonged to them, or that they were in any way interested. There is no evidence to sustain the decree in this regard.

It is suggested by defendants in error without assigning cross-errors, that the decree entered in this case is not a final decree, and that an appeal or writ of error will not lie. This position is not well taken. A decree is final which disposes of the whole merits of the cause. The mere fact that there are some things remaining to be done, does not make the decree interlocutory. It is yet to be enforced. It is only in this regard that it remains open. The decree entered in the court below is reversed and the cause remanded.

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Michael Kinney, Ex'r, v. Hardin G. Keplinger.

1. **WILLS—A Will Construed.**—The provisions of a will in regard to the appointment of executors were as follows: "I hereby appoint my wife, Sarah Clark, executrix of my last will and testament; and in case of her death or inability to act, I hereby appoint Michael Kinney executor of my last will and testament; and said executor may dispose of my real and personal property to the best advantage, as he sees fit, and make distribution according to the provisions of the will and testament after the death of my wife, Sarah Clark, as soon as possible." *Held*, that the testator was choosing the person to whom letters should issue in the first instance, and seeking only to provide against the contingency of his wife being unable to assume the duties of executrix, and that he was not naming a successor.

2. **ADMINISTRATION OF ESTATES—A Person Appointed as Executor, Held to be an Administrator De Bonis Non with the Will Annexed.**—The appointment of appellant in this case as executor being unauthorized, the court holds that he is at most only an administrator *de bonis non* with the will annexed, and that he is clothed with no greater powers than such an administrator would be.

3. **SAME—Powers of an Administrator De Bonis Non.**—An administrator *de bonis non* can not call upon the personal representatives of the first administrator for an account of assets already administered on.

4. **SAME—What Amounts to Administering on Property.**—Where an executrix collects choses in action belonging to her testator, reloan the money thus received, and takes notes in her own name, her action amounts to an administration on the property, and her personal representative can not be required to account to an administrator *de bonis non* with the will annexed of her testator.

5. **SAME—Collection of Moneys Due from the Estate of an Executor After His Death.**—Where an executor dies, with money in his possession belonging to the estate of his testator, the heirs and legatees can file their claims against the estate of the executor, sue on his bond in a court of law, or file a bill in chancery.

Petition, in probate. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

OWEN P. THOMPSON and MORRISON & WORTHINGTON, attorneys for appellant.

EDWARD P. KIRBY, attorney for appellee.

Kinney v. Keplinger.

MR. JUSTICE GLENN DELIVERED THE OPINION OF THE COURT.

Michael Kinney, as executor of the last will of William C. Clark, deceased, filed his petition in the County Court of Morgan County to obtain an order requiring appellee as administrator of the estate of Sarah Clark, deceased, to turn over to appellant as such executor certain notes, etc., described in such petition as belonging to the estate of William C. Clark, deceased.

William C. Clark, having made and published his last will on the 24th day of June, 1882, died on the 13th day of July, 1882. Sarah Clark, his widow, who was nominated by him as executrix of his will, after the will was probated on the 22d day of July, 1882, was appointed and qualified as such executrix, and entered upon the discharge of her trust.

The only provisions of the will involved in this controversy are the following:

“That after the payment of all my just debts and funeral expenses, I give and bequeath to my beloved wife, Sarah Clark, all of my real estate, personal property, monies, chattels and effects of any and every nature whatsoever, to her sole use and benefit her lifetime; that after the death of my beloved wife, Sarah Clark, that whatever remains of my property I will that it be divided as hereafter mentioned.”

Then follow a number of specific bequests to relatives of the testator and his wife, ranging from \$1,000 each down to \$100, following which specific bequests the will proceeds: “I will that the residue of my estate, if there be any left, that it be divided according to the statute of the State of Illinois, amongst all my heirs except those above named that I have excluded.”

I hereby appoint my wife, Sarah Clark, executrix of my last will and testament, and that she shall not be required to give bond, and in case of her death or inability to act I hereby appoint Michael Kinney executor of my last will and testament, and if he is unable to act, that he may appoint some suitable person in his place, and said executor may dispose of my real and personal property to the best advantage as he sees fit, and make distribution according to the provis-

ions of the will and testament after the death of my wife, Sarah Clark, as soon as possible."

Sarah Clark continued to administer said estate as such executrix until the 13th day of April, 1896, when she died. Hardin G. Kidlinger, on the 23d day of May, 1896, was appointed and duly qualified as administrator of her estate.

The estate left by William C. Clark consisted of about three hundred acres of real estate, and about twenty-four thousand dollars of personal estate, chiefly choses in action after the payment of the debts and liabilities.

Hardin G. Keplinger, as administrator of the estate of Sarah Clark, deceased, filed an inventory of the personal property belonging to the estate of Sarah Clark at the time of her death, which consisted of some thirty-three promissory notes aggregating the sum of \$28,427.93 including the interest. These notes were all payable to Sarah Clark save one small note, which was made payable to "Sarah Clark, executrix."

During the last three years Sarah Clark was acting as executrix of the last will of William C. Clark, deceased, her bank account stood in the name of Sarah Clark, executrix. She drew upon this account for all her personal expenses, re-loans, and for all other purposes, signing the check "Sarah Clark, Executrix." It appears in this bank account were also included moneys received by her as rents of lands belonging to the estate of William C. Clark, to the use and income of which she was entitled under the will of her husband, as also the income derived from her loans, notes and every other source.

Michael Kinney was granted letters testamentary as executor of the last will of William C. Clark, deceased, on the 9th day of May, 1896, by the County Court of Morgan County, and he qualified and is still acting as such executor.

The appellant charges in his petition filed herein that Hardin G. Keplinger, as administrator of the estate of Sarah Clark, deceased, included in his inventory, filed as such administrator, certain goods, notes, etc., that belonged to the estate of William C. Clark, deceased, that she acquired

control of them as executrix of the last will of William C. Clark. He charges they should be surrendered to him as the executor of William C. Clark, deceased, to be administered upon and distributed according to the provisions of the will of the testator.

The appellee admits in his answer to the petition of appellant that he inventoried the property set out in said petition as part of the estate of Sarah Clark, but denies that he has any goods, notes, etc., in his possession which belong to the estate of William C. Clark, deceased. He admits that William C. Clark died testate in the year 1882, and that Sarah Clark acted as executrix of his will until her death.

He denies that appellant, as executor *de bonis non* with the will annexed of William C. Clark, has any right or authority to call upon appellee for any accounting of any estate which was administered upon, converted or wasted by Sarah Clark in her lifetime, and if her estate is in any manner indebted to any of the heirs, legatees or distributees of William C. Clark, deceased, they have their remedy by filing their claim against the estate of Sarah Clark, deceased.

Upon a hearing, in the County Court of Morgan County, the petition was dismissed. The case was taken by appeal to the Circuit Court of Morgan County, and upon a hearing without the intervention of a jury a like result was obtained, and the appellant has brought the case to this court by appeal.

It is contended by appellant, that under his appointment as executor of the will of William C. Clark, deceased, he has the right to call upon and compel the appellee to account for and turn over to him certain notes which were inventoried, and are now held by appellee as administrator of the estate of Sarah Clark, deceased, and that they of right belong to the estate of William C. Clark, deceased, that these notes are largely for money collected on notes that came into her hands as executrix of the will of William C. Clark, deceased, appears from the evidence.

It is claimed by appellant that he is as fully the executor of the will of William C. Clark, deceased, and clothed with

the same powers as though he had been the first person appointed to fill that position, that technically he is a substituted executor.

The correctness of this position depends upon the construction given to the will of William C. Clark.

The testator uses this language in his will with reference to the appointment of an executor of his will.

"I hereby appoint my wife, Sarah Clark, executrix of my last will and testament, and that she shall not be required to give bonds, and in case of her death or inability to act, I hereby appoint Michael Kinney executor of my last will and testament, * * * and said executor may dispose of my real estate to the best advantage as he sees fit, and make distribution according to the provisions of the will and testament, after the death of my wife, Sarah Clark, as soon as possible."

There is nothing in this language to show the testator intended to substitute Michael Kinney as executor in the place of Sarah Clark. He did not appoint Michael Kinney to be executor after the death of his wife after she had entered upon the duty of executing his will, as he certainly would have done, had he intended that Kinney should succeed his wife in the discharge of this duty. His intention as indicated by the language used is, that if his wife survived the testator, and was able to act as executrix of his will at the time of his death, then letters testamentary should issue to her, but if not, then he nominated Michael Kinney as executor of his will. The testator was seeking only to provide against the contingency of his wife being unable to assume the duties of executrix, and was not naming a successor. He was choosing the person to whom letters should issue in the first instance. In this same clause in providing that Kinney should make distribution according to the provisions of the will, he uses this language, "after the death of my wife, Sarah Clark," which shows the testator had in mind that at the time of his wife's death Kinney had assumed the execution of the trust imposed by the will, because his wife had been unable to

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act. Holding the foregoing to be a correct construction of the will of William C. Clark, we hold that Michael Kinney is at most only an administrator *de bonis non* with the will annexed. Holding, as we do, that the granting of letters testamentary of the will of William C. Clark to Michael Kinney constituted him simply an administrator *de bonis non* with the will annexed, he is clothed with no greater powers than such an administrator would be.

It does not follow that unless Michael Kinney, as executor of the will of William C. Clark, can obtain the property mentioned in his petition as property belonging to the estate, then the provisions of his will will be defeated. The proof shows that Sarah Clark, as executrix of the will of her husband, William C. Clark, has administered upon the personal estate of her husband, reduced the same to her possession, mingled the money derived from the testator's estate with her own money, loaned the same on real estate, taking the notes and mortgages therefor in her own name. Now under this state of facts, under the common law, and the laws of this State, the heirs, legatees and distributees can file their claims against the estate of Sarah Clark, deceased, and upon the same being allowed, receive their distributive shares given to them by the will, and in this way the provisions of the will of William C. Clark will be executed. But they are not left to this remedy alone. They may sue the executrix and her sureties on their bond in a court of law, for the purpose of recovering their respective shares—or may file a bill in chancery. *Tracey v. Hadden*, 78 Ill. 30; *Bliss v. Seaman*, 165 Ill. 422.

This court holds that the Circuit Court, in denying the relief asked for by appellant in dismissing the petition, and that the property specified in the petition had been once administered upon by Sarah Clark as executrix of the will of William C. Clark, and was not subject to further administration by Michael Kinney, by virtue of his appointment as executor of the will of William C. Clark; that Sarah Clark, as executrix, had collected the choses in action belonging to the estate of William C. Clark, and had reloaned the money thus

received and taken notes payable in her own name; that this was a conversion by her; that each administrator and executor acts for himself and is accountable for his acts directly to the special or residuary legatees; and that the administrator of the estate of Sarah Clark, deceased, can not be called on to account to Michael Kinney, executor of the will of William C. Clark, for assets in her hands at the time that she had converted them. *Rowan v. Kirkpatrick*, 14 Ill. 1; *Newhall v. Turney*, 14 Ill. 338; *Marsh v. The People, etc.*, 15 Ill. 284; *Short v. Johnson*, 25 Ill. 489; *Duffin v. Abbott*, 48 Ill. 17; *Hanifan v. Needles*, 108 Ill. 403; *Bliss v. Seaman*, 165 Ill. 422; *Barker v. Talcot et al.*, 1 Vernon, 473; *Potts v. Smith*, 3 Rawle, 361 (24 Am. Dec. 359); *Beall v. New Mexico*, 16 Wall. 541; *Wilson, Adm'r, v. Arrick, Adm'r*, 112 U. S. 83; *Slaughter v. Froman*, 5 T. B. Monroe, 19 (17 Am. Dec. 33); *Caulkins v. Bolton*, 98 N. Y. 511; *Carrick's Adm'r v. Carrick's Ex'r*, 23 N. J. Eq. 364; *Bradway v. Holmes*, 50 N. J. Eq. 311; *Myers v. Safe Deposit & Trust Co.*, 73 Md. 413, 21 Atl. Rep. 58. Judgment affirmed.

The City of Bloomington v. N. N. Winslow et al.

1. *STREETS—Right of Property Owner to Damages for Vacation of.*—The owner of property abutting a public street which has been vacated by a city, whereby access to the property is destroyed, has an undoubted right to recover damages against the municipality.

2. *SAME—Action of Conditional Vendee, of Abutting Property as a Defense to Suit for Vacation of.*—In a suit against a city by the owner of abutting property, to recover damages caused by the closing of a street, the evidence showed that the owner of the property had executed a bond for a deed, that the grantee in the bond had joined in a petition to have the street vacated, that such grantee had not complied with his contract, and that notice of forfeiture had been served on him. *Held*, that the city was liable.

3. *PRACTICE—Motions in Arrest of Judgment.*—After a demurrer to a declaration is overruled, a plea of the general issue filed and a trial had thereon, a defendant is in no position to urge a motion in arrest of judgment on account of the insufficiency of the declaration.

Trespass on the Case, for injury to abutting property caused by the closing of a street. Appeal from the Circuit Court of McLean County;

City of Bloomington v. Winslow.

the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

JACOB P. LINDLEY, city attorney, for appellant; J. H. ROWELL and J. S. NEVILLE, of counsel.

J. J. MORRISSEY, attorney for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action on the case against the City of Bloomington to recover damages for vacating and closing a street whereby access to two city lots owned by appellees was cut off. They recovered a judgment for \$300.

The owner of property abutting a public street which has been vacated by a city, whereby access to it is destroyed, has under our statute and the decisions of our Supreme Court an undoubted right to recover damages. Chapter 145, Rev. Statutes; City of Chicago v. Burchy, 158 Ill. 103. The proofs in the record sufficiently show that appellees were the owners of the property and that they were damaged by the closing of the street to the extent of the damages allowed by the jury.

Complaint is made of the action of the court in sustaining demurrers to two special pleas filed by appellant setting up that Winslow was estopped from claiming damages by reason of his executing bonds for deeds to the lots to one Jesse M. Goodheart, and placing him in possession of them, and by Goodheart's joining in a petition to the city to vacate the street. The evidence shows Goodheart had not complied with his contract either in paying interest or taxes and that notice of forfeiture was given him several weeks before the action of the city council. The pleas were not good as pleas in estoppel.

The refusal of the court to grant a continuance because Sarah L. Winslow was joined as party plaintiff was not error. The affidavit was insufficient.

We see no substantial error of the court either in the giving or refusing of instructions, or in passing upon the admissibility of evidence.

It is urged that the motion in arrest of the judgment should have been sustained. The motion was based upon the insufficiency of the declaration. Objection to the declaration was first presented by a general demurrer, and much space is occupied in appellant's brief to show that the declaration is bad. None of the defects pointed out were such that they could not be cured by a verdict. It may be said, too, that as the general issue was filed and a trial had thereon, appellant was in no position to urge a motion in arrest of judgment. *Ladd v. Pigott*, 114 Ill. 647; *Helmuth v. Bell*, 150 Ill. 263.

We see no sufficient reason for reversing the judgment. Judgment affirmed.

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Mary E. Black et al., Ex's, v. Amos Miller.

1. **EQUITY PRACTICE**—*Objections to Jurisdiction Must be Made in the Trial Court.*—If a defendant in a court of equity answers and submits to the jurisdiction of the court it is too late for him to object in a court of appeal that the complainant had an adequate remedy at law.

2. **AGENCY**—*An Agent Can Not Act for Both Parties to a Contract.*—A contract made by one who acts as the agent of both parties, may be avoided by either principal, and such cases do not turn upon the point whether there was an intention to cheat or whether the complaining party has suffered an injury; the law declares the transaction fraudulent upon grounds of public policy.

Bill for an Injunction, and the cancellation of a note. Error to the Circuit Court of Montgomery County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

STATEMENT OF THE CASE.

In 1887, Amos Miller, a resident of Hillsboro, Illinois, procured Johnson and Blackwelder, real estate agents, at Wichita, Kansas, to make real estate investments for him in that city. He sent them \$1,000 for that purpose, to be invested according to their best judgment. They accordingly made a deal with one Robert Black, father-in-law of Johnson, for the undivided half of four unimproved lots in the outskirts of Wichita for \$1,600. Black and wife executed

Black v. Miller.

deed to Miller, \$800 was paid to Black, less sale commissions of five per cent—and Miller executed his note to Black for \$800, payable in six months, and his mortgage on the lots to secure its payment.

The note not being paid at maturity, Black proceeded to foreclose the mortgage, and, upon a foreclosure sale, bid in the lots for \$25 each. He died afterward, testate. At the April term, 1896, of Circuit Court of Montgomery County, Illinois, his executors brought suit against Miller to recover on the note. Thereupon, Miller filed a bill in equity for the purpose of enjoining the suit at law, and having the note surrendered for cancellation upon the ground that the real estate deal was fraudulent as to him.

Upon a hearing, the Circuit Court decreed the sale of the lots and the execution of the note and mortgage to be fraudulent, for the reason that Johnson and Blackwelder were the agents of Black as well as Miller in the deal, that the suit at law be perpetually enjoined, and that the note be surrendered for cancellation.

HOWETT & JETT and F. A. RANDLE, attorneys for plaintiffs in error.

GEORGE R. COOPER, attorney for defendant in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted for the purpose of reversing a decree of the Circuit Court declaring the sale of certain real estate in Wichita, Kansas, fraudulent and void, and perpetually enjoining the prosecution of a suit at law to collect a promissory note given in part payment for the real estate by defendant in error to the testate of plaintiffs in error.

The first point of contention is that defendant in error had an adequate remedy at law.

Waiving a decision of the question whether he could have set up the fraud of the transaction in the suit at law, we will say that the plaintiffs in error are in no position to

urge that contention. If they desired to rely upon that point they should have stood by their demurrer. Instead, they answered and submitted the cause upon the merits. If a defendant in a court of equity answers and submits to the jurisdiction of the court, it is too late for him to object in a court of appeal that the complainant had an adequate remedy at law. *Stout et al. v. Cook*, 41 Ill. 447; *Magee v. Magee*, 51 Ill. 500.

The evidence in the record clearly shows that Johnson and Blackwelder in the transaction acted in the dual capacity of agent for Miller, the purchaser, and of agents for Black, the seller. As the agents of Miller, they received his \$1,000 and undertook to invest it for speculation. As the agents of Black, they sold the lots upon a commission. The fact that they were not to receive commissions from Miller until after a sale of the real estate had been effected for him did not alter the situation.

The law of the case, then, is well stated by a quotation from Story on Agency, Section 211: "Hence it is well settled that an agent employed to sell can not become the purchaser, and an agent employed to buy can not himself be the seller. And upon the same principle it is held that a contract made by one who acts as the agent of both parties, may be avoided by either principal."

Evidence was introduced tending to show that the real estate at the time of the purchase was fully worth the contract price, and that Johnson and Blackwelder practiced no fraud on Miller. And it is here contended that a purchaser of real estate who sends money to an agent to invest, can not in the absence of fraud or deceit practiced upon him, rescind the contract of purchase where he has suffered no injury and paid no commission, even though the agent was acting for the vendor.

The question in such cases does not turn upon the point whether there was an intention to cheat, or whether the purchaser has suffered an injury. It is upon grounds of public policy that the law declares such a purchase fraudulent. It considers the fiduciary relation of the parties, and

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the abuses which may attend such transactions when full and frank disclosures are not made. In transacting the business of his principal, the law will not permit the agent to place himself in a position that will be a strain upon his honesty. And for that reason our Supreme Court has repeatedly held that an agent can not, either directly or indirectly have an interest in the sale of the property of his principal, which is within the scope of his agency, and that it is immaterial in such case that no fraud was actually intended.

In the case of Warrick v. Smith, 137 Ill. 504, following the rule above quoted from Story, our Supreme Court uses this language: "The same man can not act as agent of both seller and buyer. His duty to one is inconsistent with his duty to the other." Of course the rule does not apply in a case where the dual capacity of the agent is known to the principals. And it would be the duty of a principal, ignorant of that fact at the time of the purchase, to disaffirm the contract within a reasonable time after receiving knowledge of it.

One of the points of contention made in this case is that Miller should have been denied the relief sought, because of the delay of nine years in disaffirming the purchase made by Johnson and Blackwelder.

He alleges in his bill and swears that he first obtained knowledge of the fact that Johnson and Blackwelder were the agents of Black in the transaction in the spring of 1896, shortly before he was sued and filed his bill. There is no proof to the contrary. He disaffirmed the contract and sought the aid of a court of equity to relieve him from its consequences very promptly.

It is contended that Miller was not a competent witness because the plaintiffs in error defended as the testators of Black. He testified only to facts occurring after the death of Black, and therefore came within the first exception to section 2 of chapter 51, entitled "Evidence."

An examination of the answer will show that the plaintiffs in error did not deny the allegation in the bill that

knowledge of the fact that Johnson and Blackwelder were agents for Black, only came to Miller just before filing the bill, but in it denied that they were the agents of Black, and went to trial upon that issue.

The decree was right and should be affirmed.

City of Canton v. Sophie B. Dewey.

1. **NEGLIGENCE**—*Finding as to Approved.*—The evidence in this case shows a clear case of negligence on the part of appellant, and the court is not able to say that the jury were wrong in finding appellee not guilty of contributory negligence.

2. **EXECUTIONS**—*Award of, Against Municipal Corporations Not Reversible Error.*—It is error to award executions against a city, but such error will not deprive the plaintiff of the benefit of his judgment, as a court of review will order the necessary corrections and direct the court below to amend its record accordingly.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

FRED H. SNYDER, attorney for appellant.

CHIPERFIELD, GRANT & CHIPERFIELD, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$1,000, rendered against appellant in an action on the case brought by appellee to recover for injuries sustained by her in falling into a trench allowed to remain exposed on one of appellant's streets, which was being paved.

It is contended, first, that the city was not guilty of negligence; second, that appellee was guilty of such contributory negligence on her part as to preclude a recovery.

The evidence in the record shows that while the city was

grading and paving one of its principal streets, known as North Main street, its grade was lowered between two and three feet at its intersection with West Spruce street, leaving the grade of the sidewalk unchanged. The old crossing had been removed and a trench two feet deep had been dug for the setting of the curbstone. Into the trench the curb had been placed, extending above it several inches, so that one passing over that line of travel would have to step over the curb. The spaces between the curbstone and the sides of the trench had been but partially filled at the time of the accident. Appellee, while attempting to make the crossing in the night time, had her foot caught between the side of the trench and the curbstone, and was thereby thrown forward with such violence as to break her left leg below the knee.

A preponderance of the evidence shows that the place was not barricaded, and that no signal lights were placed out to give warning to pedestrians of its dangerous character. The evidence shows a clear case of negligence on the part of the city.

Appellant contends that appellees knew the place in the street at which she received her injury was undergoing improvement, and that it was dangerous, and that it was such negligence in her attempting to cross over it in the dark as to preclude her right to recover.

The testimony of appellee was that she did not know of the dangerous condition of the trench and curb, but supposed the improvement extended only to the paving of the street, and that the sidewalk and crossing were open for use. What knowledge she had in that regard was a question of fact for the jury, and we are not disposed to say that the jury were wrong in believing her.

The jury were properly instructed, and no error was committed in refusing certain offered instructions.

To the contention that improper remarks were made to the jury in the concluding argument of appellee's counsel, it is sufficient to say that no such remarks were preserved in the bill of exceptions.

The court erred in awarding an execution on the judgment against the city, of course, but such error should not deprive appellee of her judgment. The judgment will be modified by eliminating so much of the order as awards execution, and as modified will be affirmed. The clerk of this court will certify to the Circuit Court an order modifying the judgment so that the record there may be corrected. *City of Pekin v. McMahon*, 53 Ill. App. 189, affirmed in 154 Ill. 141. The clerk will not enter judgment against appellee for the costs, however, but will tax same against appellant. Judgment affirmed.

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80	684

**People ex rel. Commissioners of Highways of the Town
of Sullivan v. Board of Supervisors
of Moultrie County.**

1. **ROADS AND BRIDGES—*Right of Township to Receive Aid in Construction of Bridge—When not Waived.***—It is not discretionary with a county board to grant or refuse aid in building a bridge, when the highway commissioners applying for such aid have done all that the statute requires of them; and the right to an appropriation of an amount equal to one-half of the estimated cost of the bridge accrues when the proper petition is presented and is not waived by the execution of a contract for the construction of the bridge.

Mandamus, against a board of supervisors to compel an appropriation in aid of the construction of a bridge. Error to the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded with directions. Opinion filed September 18, 1897.

SPITLER & BURNS, attorneys for plaintiffs in error.

Under the act of 1883, the Supreme Court held that the application for county aid did not come too late because the commissioners had let the contract. *Board of Supervisors of Logan County v. The People*, 116 Ill. 466.

A like ruling had been made under the act of 1879. *Town of New Boston v. Board of Supervisors of Mercer County*, 110 Ill. 197.

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The present statute requires the commissioners, when they have determined to ask county aid, to petition the county board, before entering into any contract for work, material or any other expense. It does not require anything more. If they have taken the statutory steps to entitle them to county aid, when they shall have presented the proper petition to the supervisors, then the board of supervisors will have "had their day in court." Upon the refusal of the supervisors to do their duty in granting county aid when the statutory showing is made by the petition, the commissioners will be left entirely free to make the necessary contract and to take any proper action to subserve the public interests. Hurd's R. S., 1895, chapter 121, section 19; Board of Supervisors of Macon County v. People ex rel., 121 Ill. 616.

They can afterward go into court, and by appropriate proceedings, compel the payment of the amount for which the county is liable. When the highway commissioners have performed the conditions precedent required by the statute before asking county aid, the board of supervisors have no discretion in the matter, but are required by law to appropriate one-half of the cost of the bridge or other structure from the county treasury. People ex rel. v. Board of Supervisors of Iroquois County, 100 Ill. 640; Board of Supervisors of Stark County v. People ex rel., 118 Ill. 459.

Where their petition presented to the county board shows all the facts required by the statute to entitle the commissioners to county aid, the board of supervisors are required to act and have no legal right to reject the petition and refuse county aid, as alleged in this application for mandamus. Board of Supervisors of Champaign County v. Town of Condit, 120 Ill. 301; Board of Supervisors of Macon County v. People ex rel., 121 Ill. 616.

Whether the new steel bridge was necessary, the reasonable amount of its cost, and whether the major part of the levy of road and bridge tax allowed by law for the commissioners to raise, was necessary for the ordinary repair of roads and bridges, were questions to be decided solely by the

commissioners. These questions are jurisdictional, and are left to the commissioners by the statute. Hurd's R. S., 1895, Chap. 121, Sec. 19; *People v. Board of Supervisors of Madison County*, 125 Ill. 9; *The People ex rel. v. Board of Supervisors of Madison County*, 125 Ill. 342.

When they have acted upon them and decided them in the affirmative their finding is conclusive. *Board of Supervisors of Macon County v. People ex rel.*, 121 Ill. 616; *Town of New Boston v. Board of Supervisors of Mercer County*, 110 Ill. 197.

When the commissioners have presented to a regular meeting of the board of supervisors the requisite petition, showing all necessary prior action to have been taken to entitle them to county aid, their right of recovery from the county of one-half of the cost of the bridge, then and there accrues. *Board of Supervisors of Logan County v. People ex rel.*, 116 Ill. 473; *Board of Supervisors of Stark County v. People ex rel.*, 118 Ill. 459.

R. M. PEADRO, attorney for defendant in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error presented to the Circuit Court a petition for mandamus to compel defendants in error to make an appropriation of \$1,000, to aid in the construction of a bridge over Okaw river. The petition shows that the plaintiffs in error, as commissioners of highways, had determined upon the construction of the bridge, had estimated the cost of construction at \$2,000, and had petitioned defendants in error to appropriate one-half the sum so estimated from the county treasury as provided by Sec. 19, Chap. 121, entitled, "Roads," etc., but that the defendants in error rejected the petition and refused to make the appropriation.

To the petition for a mandamus, defendants in error filed an answer in the nature of a plea of confession and avoidance, setting up that after the filing of the petition for aid,

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and the refusal by the county board, and before the filing of the petition for mandamus, the plaintiffs in error entered into a contract for the construction of the bridge with the Indiana Bridge Company, claiming that they were thereby barred all right of aid from the county. A demurrer was filed to the answer, which was by the court overruled.

Plaintiffs in error stood by their demurrer and the court rendered judgment against them for costs.

In our opinion the plea did not present a good defense to the petition, and the court erred in overruling the demurrer to it.

Plaintiffs in error show by their petition that they had done all that was required of them by the statute when they applied to the county board for aid. It was not discretionary with the county board to grant or refuse the aid when the highway commissioners had done all that the statute required of them. The right to it accrued to the commissioners when they presented their petition on the 10th of September, 1895, and was not waived by their entering into the contract for construction with the bridge company.

The amount of the appropriation to which they are entitled is one-half of the estimated costs, and not one-half of the contract price with the company.

The judgment will be reversed and the cause remanded with directions to the Circuit Court to sustain the demurrer to the answer, with leave to defendants in error to plead again if they desire.

Reversed and remanded.

Modern Woodmen of America v. Mec H. Anderson.

1. **INSURANCE—Waiver of Forfeiture Clauses by Course of Dealing.**—Where an insurance company, in its course of dealing with an insured, leads him to a reasonable belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as a defense in a suit upon the policy.

2. *SAME—Waiver of Forfeiture Clauses by Levying Assessments.*—If an insurance society, after learning that one of its members is delinquent in the payment of assessments which have been made against him, levies upon him another assessment, for a subsequent period, it thereby recognizes the continued existence of his membership, and waives its right to declare the contract forfeited for such delinquency.

3. *EVIDENCE—Effect of Objections to.*—The defendant in a suit upon a policy of insurance produced a witness who testified that the deceased had expressed an intention to let his insurance lapse, and thereupon plaintiff offered to show that deceased was insane at the time the statement was made, but was not allowed to do so, the defendant interposing an objection. *Held*, on appeal, that if deceased was insane at the time, the making of such remark could have no bearing, and that defendant having presented a showing to that effect, could claim no benefit from the remark.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of McLean County; the Hon. THOS. F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

STATEMENT OF THE CASE.

On the 9th of April, 1889, S. T. Anderson became a member of the Modern Woodmen of America, a fraternal benefit society, incorporated under the laws of the State of Illinois, and there was issued to him a certificate of insurance for \$2,000, payable at his death to his wife, appellee.

The certificate was subject to certain conditions, among which was that all assessments levied for death benefits should be paid to the local clerk of the camp to which Anderson belonged before the first day of the month following the levying of the same, and a failure therein should render the certificate null and void.

Anderson paid all assessments from the date of the certificate up to the time of his death, except those for the months of June and July, 1896, but not always before the first day of the month following the levying of the same. He did not pay the assessments due in March, April, May and June, 1895, until in July of that year. He did not pay the assessments due in July and August until in September of that year. He did not pay the assessments due in September, October and November, 1895, until in January, 1896.

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On the 10th day of August, 1896, Anderson died, leaving unpaid the assessments for June and July of that year.

This suit was brought by his widow to recover the \$2,000 named in the certificate and was defended upon the ground that the certificate was forfeited because of non-payment of the assessments for June, 1896, and those for January and April of that year.

The case was tried by the court without a jury. The court found the certificate was in force at the death of Anderson and rendered judgment in favor of appellee for \$1,997.80.

HESS & JOHNSON and WELTY & STERLING, attorneys for appellant.

There can be no waiver of forfeiture unless it is intended, or unless the act relied upon as a right would in equity estop the party from denying that he intended it to be a waiver of the condition precedent. Niblack on Ben. Soc., Sec. 306; *Miller v. Union Cent. Life Ins. Co.*, 110 Ill. 102; *Mut. Protec. Ins. Co. v. Laury*, 84 Pa. St. 43; *Crawford Co. Mut. Ins. Co. v. Cochran*, 88 Pa. St. 230; *Bennecke v. Ins. Co.*, 105 U. S. 355; *Northwestern Mutual Life Ins. Co. v. Amerman*, 119 Ill. 329; *Sweetser v. Odd Fellows M. A. Ass'n*, 117 Ind. 97; *Bosworth v. West Mut. Aid, Society*, 75 Iowa, 582; *Schmidt v. Modern Woodmen*, 84 Wis. 101, 54 N. W. Rep. 264.

"And when the contractual relation between the society and the member is not wholly dissolved by the non-payment within a certain time, of the assessment called for, but the liability of the society on the contract of insurance is merely suspended by such non-payment during the time the assessment remains unpaid, the society does not by the levy of a second assessment during the period of default in the payment of a prior assessment, and during the period of consequent suspension of liability, remove the disabling consequences resulting to a member and his beneficiary from his neglect to pay an assessment." Niblack on Mut. Ben. Soc., 584, and cases there cited.

"The sending of notices of assessment after default in such a case, will not be construed into an acknowledgment

of liability upon the contract, and a waiver of the suspension, but will be held to be reminders to the member that he may, under the contract, revive his certificate." *Id.* (Niblack), 306. See also *Leffingwell v. Grand Lodge*, 86 Iowa, 279; 53 N. W. Rep. 243; *Schmidt v. M. W. of A.*, 84 Wis. 101, 54 N. W. Rep. 264.

To constitute a waiver, the insured must be induced by the company to do or omit to do some act which he would not otherwise have done or omitted. *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479; *Mobile L. I. Co. v. Pruett*, 74 Ala. 487.

FIFER & BARRY, attorneys for appellee.

If the practice of an insurance company and its course of dealing with an insured has been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief. *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410; *Railway P. and F. C. Ass'n v. Tucker*, 157 Ill. 194; *United States Life Ins. Co. v. Ross*, 159 Ill. 485; *National Gross Loge v. Jung*, 65 Ill. App. 313.

A mutual life insurance company may waive a forfeiture by making a new assessment while a member is in default through a failure to pay a previous assessment within the time limited by the by-laws. The question of waiver is in most cases a question of fact for the jury. *Railway P. and F. C. Ass'n v. Tucker*, 157 Ill. 194.

Every time the company makes an assessment against the assured after he has failed to pay a previous assessment within the time prescribed by the rules, it waives the forfeiture of the policy for such failure, and admits him to be a member of the association, notwithstanding such failure. *Railway P. and F. C. Ass'n v. Swartz*, 54 Ill. App. 445.

After the insured has become delinquent for non-payment of an assessment within the stipulated time, the company waives its right to declare the contract forfeited for such

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delinquency, if with knowledge thereof, it makes a new assessment. The making of a new assessment is a recognition of the continued existence of the membership. *Railway P. and F. C. Ass'n v. Tucker*, 157 Ill. 194.

If after a member has become delinquent by a failure to pay an assessment, a new assessment is levied upon him with knowledge of such delinquency and non-payment, this will constitute a waiver of the forfeiture, even though the notice of the assessment contains a warning that the sending thereof, is not to be held to waive a forfeiture. *Beatty v. Mutual Reserve Fund Life Ass'n*, 75 Fed. Rep. 65; *Griesa v. M. B. Ass'n*, 15 N. Y. S. 71.

An association can not levy an assessment, give notice and demand payment of the same, and at the same time insist that the doing of these acts shall not have any force and effect. *McGowan v. North Western L. of H.*, 67 N. W. Rep. (Iowa), 89; *Beatty v. M. Res. Fund Life Ass'n*, 75 Fed. Rep. 65; *Griesa v. M. B. Ass'n*, 15 N. Y. S. 71.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered upon a certificate or policy of insurance on the life of appellee's husband, held in the Modern Woodmen of American. The contention is that the holder of the certificate, S. T. Anderson, at the time of his death, had ceased to be a member of appellant, and that the certificate was void by reason of his failing to pay certain quarterly dues and a mortuary assessment made for the month of June, 1896.

The point is made in appellant's brief that no demand for the payment of the amount of the certificate was made by appellee or proofs of the death of her husband presented to the society before the commencement of the suit, but we shall not consider it for the reason that it was stipulated upon the trial that the defendant would raise no question except in regard to non-payment of dues and assessments.

Concerning the contention that the certificate was rendered void by Anderson's failing to pay the quarterly dues

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of January and April, 1896, it is sufficient to say that appellants, instead of electing to so consider it, made and collected from him mortuary assessments after his default therein, and by so doing recognized him as a member and the certificate as being in force.

The important question involved is whether the non-payment of the mortuary assessment for June was sufficient to defeat a recovery.

While we are inclined to the view that proof of notice of the assessment was not properly made, and that the court should have sustained the objection to the affidavit offered, we prefer to decide the case upon the broader and more substantial ground that by levying an assessment upon Anderson after his delinquency was known to appellant it waived its right to claim a forfeiture.

If the assessment for July had been paid there could be no question under the authorities that the society would be estopped from claiming that a failure to promptly pay the June assessment worked a forfeiture of the certificate of insurance.

While the general requirement for the prompt payment of mortuary assessments is quite rigid it does not seem that appellant insisted upon a strict compliance with it from appellee's husband.

There were several instances in the year 1895, where assessments were paid by him months after they were due and payable. The course of conduct of appellant toward him in that regard was such as to induce in his mind a belief that that part of the contract which provides for a forfeiture in the event of failure to comply promptly with that rigid requirement would not be insisted upon.

Where an insurance company, in its course of dealing with the insured, has led him to a reasonable belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as a defense in a suit upon the policy. *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410; *Railway P. & F. Co.*

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Ass'n v. Tucker, 157 Ill. 194; United States Life Ins. Co. v. Ross, 159 Ill. 485; National Gross Loge v. Jung, 65 Ill. App. 313.

In the face of the fact that Anderson was in default of payment of the June assessment, appellant levied assessments against him for the months of July and August; that would seem to indicate that the same course of dealing that had been pursued toward Anderson would be continued.

If appellant, after learning that Anderson was delinquent in payment of assessments which had been made against him, levied another assessment for a subsequent month, it thereby waived its right to declare the contract forfeited for such delinquency.

The making of the subsequent assessment was a recognition of the continued existence of Anderson's membership. Railway P. and F. C. Association v. Tucker, 157 Ill. 194; Railway P. and F. C. Association v. Swartz, 54 Ill. App. 445; Stylow v. Wis. Odd Fellows' M. L. Ins. Co., 69 Wis. 224; Painter v. Industrial Life Ass'n, 131 Ind. 68.

There was ample evidence that appellant's officers had knowledge of Anderson's delinquency on the June assessment when the assessments for July and August were made.

Appellant produced a witness who testified that about a month before Anderson died he told him that he intended to allow his Modern Woodmen insurance to lapse.

Appellee offered to show that for two months before his death Anderson was insane, but the court, upon the objection of appellant, would not allow her to do so. If, as a matter of fact, Anderson was insane at the time, the making of such remark could have no bearing; and if, upon appellant's objection, appellee was denied the right to show such insanity, then appellant can claim no advantage from the remark.

We are clearly of the opinion that the right to claim a forfeiture because of the non-payment of the June assessment was waived, and that the judgment should stand.

Judgment affirmed.

People, for Use of Wm. Lenand, v. Adam Linck et al.

1. **INTOXICATING LIQUORS**—*A Saloon Keeper is Not Liable to a Purchaser of Liquor for Injuries Received by Him While Intoxicated.*—One who was an active and willing agent in procuring his own intoxication, can not recover upon a saloon keeper's bond for injuries caused by such intoxication. The statute was only intended to cover cases where innocent parties have been injured by the wrongful act of the principal in the bond.

Debt, on a saloon keeper's bond. Error to the Circuit Court of Douglas County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

J. M. NEWMAN and T. D. MINTURN, attorneys for plaintiff in error.

E. L. WALKER and ECKHART & MOORE, attorneys for defendants in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an action of debt upon a saloon keeper's bond, brought by William Lenand in the name of the People, to recover for injuries sustained by him, while in a state of intoxication caused by liquor procured from Adam Linck, the saloon keeper. He alleges in his declaration that he is a man in the habit of getting intoxicated; that Linck sold and gave him liquor from which he became intoxicated, and that, as a consequence, he fell upon the track of the Illinois Central Railroad, where he was run over by a train and was so injured as to necessitate the amputation of one of his arms. The Circuit Court sustained a demurrer to the declaration and rendered judgment against Lenand for costs.

The only question for our decision is whether one who was an active and willing agent in procuring his own intoxication may recover upon a saloon keeper's bond for injuries caused by such intoxication. We do not think the stat-

ute was intended to cover any such case, but rather those cases where parties have been innocently injured by the wrongful act of the principal in the bond.

The party complaining and seeking damages must be free from complicity in procuring the intoxication. Such appears to be the view of courts of last resort in this State, Iowa and Michigan, although in none of the reported cases were the facts the same as in this case. In each of those cases, the complaining party was seeking damages for injuries caused by the intoxication of another. *Reget v. Bell*, 77 Ill. 593; *Hays v. Waite*, 36 Ill. App. 397; *Engleken v. Hilger*, 43 Iowa 563; *Rosecrants v. Shoemaker*, 60 Mich. 4.

In Iowa and Michigan, where the statutes giving a right of action to persons injured by reason of the intoxication of another are similar to ours, it is held that the wife can not recover damages from a saloon keeper who has caused the intoxication of her husband, if she herself encouraged or requested the sale of the liquor to her husband. Such holdings were based upon the ground that she was not an innocent injured party. In *Reget v. Bell*, *supra*, our Supreme Court has gone even farther, and held a wife would be precluded from a recovery if she had it in her power to deprive her husband of the use of the whisky which caused his intoxication by breaking the jug or pouring out its contents, and failed to exercise it.

The reasons which lie at the bottom of the holdings in those cases, in our opinion, apply with greater force to the case at bar.

Lenand was not an innocent injured party. He was a volunteer in his own intoxication, and in his declaration showed no right to recover against defendants in error.

Judgment affirmed.

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896	610

D. M. Sechler Carriage Company v. C. Lane.

1. NOTICE—*By Facts to Put a Party on Inquiry.*—In a suit against a purchaser of personal property by the holder of an unrecorded lien, it is not necessary to show that the purchaser had actual knowledge of the vendor's intention to defraud. If the circumstances surrounding the transaction are such as to put a prudent and cautious man upon inquiry, and the purchaser closes his eyes against those lights which, if pursued, would disclose the fraudulent purpose of his vendor, he must suffer the consequences as though he had received actual notice.

Replevin.—Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 13, 1897.

JOHN R. & WALTER EDEN, attorneys for appellant.

Where the court is satisfied that a subsequent purchaser acted in bad faith, and that he either had actual notice of the rights of a third party, or might have had that notice had he not willfully or negligently shut his eyes against those lights, which with proper observation would have led him to knowledge, he must suffer the consequences of his ignorance, and be held to have had notice so as to taint his purchase with fraud in law. It is sufficient if the channels, which would have led him to the truth, were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, if he was liable to suffer the consequences of his ignorance. The law will not allow him to shut his eyes when his ignorance is to benefit himself at the expense of another, when he would have been open and inquiring had the consequence of his ignorance been detrimental to himself and advantageous to the other. *Doyle et al. v. Teas et al.*, 4 Scam. 202.

This decision has been followed in subsequent decisions by our courts.

If the purchaser from a fraudulent vendor buys with notice of the fraudulent intent of his vendor, he stands in

D. M. Sechler Carriage Co. v. Lane.

his vendor's shoes, and notice may be inferred from the existence of facts and circumstances that would place a man of ordinary prudence on inquiry with reference to the conduct of his vendor. *Thompson v. Duff*, 19 Ill. App. 75; *Bump on Fraudulent Conveyances*, 2d Ed., 200.

Any notice or circumstance that tends to give notice, or informs the party that there is an incumbrance, is sufficient to charge him with notice. *Ætna Life Ins. Co. v. Ford*, 89 Ill. 252.

A sale, in making which the object of the debtor is to hinder, delay, or in any way put off his creditors, is void if made to one having knowledge of such intent; and this knowledge need not be actual positive information or notice, but will be inferred from the knowledge by the purchaser, of facts and circumstances sufficient to raise such suspicions as should put him on inquiry. *Avery v. Joham*, 27 Wis. 246.

R. M. PEADRO, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellant, a corporation, brought an action of replevin against appellee to recover eight buggies and two surreys, which it had consigned to Hill and Fread, dealers in farm implements, at Bethany, Illinois.

The sheriff not being able to find the goods described in the writ, there was a trial upon a count in trover, resulting in a verdict and judgment for appellee.

The record shows that the goods were consigned to Hill and Fread in May, 1896, under an agreement to sell the goods of appellant's manufactory for that year on commission, consisting of the net surplus on sales over and above the invoice price.

In September Hill sold his interest in the business to Fread, Fread assuming the debts of the firm, and within a few days thereafter Fread traded his entire stock of goods, including the goods in controversy, to appellee for 160 acres of Nebraska land.

It is contended by appellant that such trade was made by Fread for the purpose of defrauding his creditors, and that appellee had notice of such fraudulent purpose. Appellee swore that at the time of making the trade he had no information of appellant's claim upon the goods, and in that he is not contradicted.

But it is insisted that the conduct of Fread was so strange and suspicious as to put him upon inquiry, which, when made, would have given him notice of Fread's fraudulent purpose. That, of course, was a question for the jury. It was the pivotal point in the case and it was highly important for the jury to be correctly instructed upon it.

In a case of this kind to show that the purchaser had actual knowledge of the vendor's intention to defraud, is not required. If the circumstances surrounding the transaction were such as to put a prudent and cautious man upon inquiry, that would be sufficient. If the purchaser closes his eyes against those lights which, if pursued, would disclose the fraudulent purpose of his vendor, he must suffer the consequences as though he had received actual notice. *Doyle et al. v. Teas et al.*, 4 Scam. 202; *Aetna Life Ins. Co. v. Ford*, 89 Ill. 252; *Bent v. Coleman et al.*, 89 Ill. 364.

The trial court not only refused to give to the jury that principal of law when asked by appellant, but gave the following erroneous instruction in behalf of appellee.

2. Fraud can never be presumed, but like any other fact, must be proven by a preponderance of the evidence, and in this case before the jury would have a right to find that the conveyance from Fread to the defendant, Lane, was not a *bona fide* transaction, the plaintiff must prove that fraud entered into such transaction, and this must be shown from the evidence, and it must also appear from the evidence, that Lane as well as Fread participated in such fraud to the extent of having knowledge of Fread's intent, and unless the plaintiff has shown by a preponderance of the evidence that Fread fraudulently conveyed the property in controversy to Lane for the purpose of hindering and delaying his creditors, and that Lane knew of such fraudulent

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intent, and thereby assisted the said Fread in such fraudulent transaction, the verdict of the jury should be for the defendant.

Appellant's refused instructions, numbers five and seven, should have been given.

For the error of the court in giving the above quoted instructions for appellee and in refusing the two mentioned for appellant, the judgment will be reversed and the cause remanded for another trial.

John Mathews Apparatus Co. v. Minor B. Neal et al.

1. *SPECIAL FINDINGS—Must Relate to Ultimate Facts.*—Special findings must relate to ultimate facts, which are controlling in their character, and although a finding may be very important as tending to prove an ultimate fact, yet if it is not in and of itself a controlling one in the case, it is not sufficient to support a judgment as a general verdict.

2. *SAME—As to Merely Evidentiary Facts Should be Ignored.*—Interrogatories calling for special findings upon merely evidentiary facts should be refused, and if given and answered, the answer should be ignored on a motion for judgment.

3. *SAME—When They Will Control the General Verdict.*—All reasonable presumptions will be entertained in favor of a general verdict as against a special finding, and before a special finding can be allowed to control the general verdict there must be such antagonism between them that it could not be removed by any evidence admissible under the issues tried by the jury. The trial court should look not to the evidence heard, but to what could have been heard under the issues.

Replevin, for goods seized under an execution. Appeal from the County Court of DeWitt County; the Hon. GEORGE K. INGHAM, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 18, 1897.

STATEMENT OF THE CASE.

This was an action of replevin, by appellant, to recover possession of a soda fountain apparatus, valued at \$604.33, which had been placed in the restaurant of Fred H. Magill & Co., at Clinton, Ill.

The declaration was in *cepit* and *detinet*. A default was entered against two of the defendants, Fred H. Magill and George W. Myers. The other defendants pleaded *non-cepit, non-detinet*, property in Magill & Co., and three special pleas justifying the taking of the property under various writs of execution, attachment and distress warrant, which came to their hands as sheriff and constable, and which had issued against Magill & Co.

The plaintiff (appellant here) replied that the property was the property of Magill & Co. and not subject to the writs.

A trial by jury was had, resulting in a general verdict for the plaintiff. At the instance of the defendants, the court propounded the following special interrogatory to the jury: "After the plaintiff sold and delivered the apparatus to Magill & Co., did the plaintiff, by any authorized agent, regain possession of the same before the alleged levy of the writs in this case?" To that question the jury answered "No."

Upon motion of counsel for the defendant, the court entered judgment upon the special finding, notwithstanding the general verdict, and ordered the plaintiff to return the property replevied or pay off the execution.

O. E. HARRIS and E. J. SWEENEY, attorneys for appellant.

"If on a verdict for the plaintiff, judgment is entered for the defendant, or *vice versa*, it is error on the face of the record, unless on the record something appears to justify such judgment. The justification may be on the pleadings, as when the judgment is arrested or entered '*non obstante veredicto*.' Unless the finding is irreconcilable with the general verdict, looking only at the pleadings, verdict and findings, the general verdict will prevail." *Gall v. Beckstein*, 66 Ill. App. 478; *Smith v. McCarthy*, 33 Ill. App. 176; *Stein v. Chicago & Grand Trunk Railway Co.*, 41 Ill. App. 38; *Black on Judgments*, Vol. 1, Sec. 186; *Hallberg v. Brosseau*, 64 Ill. App. 520.

A fact which merely tends to prove a fact in issue without actually proving it, is not inconsistent with the general

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verdict, whatever that may be. The court can not look to the evidence; the inconsistency must be so irreconcilable as to be incapable of being removed by any evidence admissible under the issues. *Chicago & N. W. Railway Co. v. Dunleavy*, 129 Ill. 132.

The special answers control the general verdict only when the antagonism is so great that it could not be removed by any evidence admissible under the issues. If the general verdict and special answers can both stand upon any reasonable hypothesis, having regard not to the proof actually made, but to that possible under the issues, the general verdict must be upheld. *Simons' Adm'r v. Beaver*, 15 Ind. App. 510, 43 N. E. 478, and cases there cited.

E. B. MITCHELL, FRANK K. LEMON and MOORE, WARNER & LEMON, for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County Court, rendered in favor of the defendants in a replevin suit upon a special finding of the jury, when the jury had returned a general verdict against them.

The question of when a court will be authorized to enter a judgment against the general verdict of the jury, because of its being inconsistent with some special finding of fact returned at the same time, has been frequently before our Supreme and Appellate Courts since the act of 1887, relative to special verdicts, was passed.

Not only should interrogatories calling for findings upon merely evidentiary facts be refused, but if given and answered, the answer should be ignored, on a motion for judgment. The special finding must relate to ultimate facts, such as are controlling in their character. The finding may be very important as tending to prove an ultimate fact, and yet, if it is not in and of itself a controlling one in the case, it is not sufficient to support a judgment as against a general verdict. *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132; *Ebsery v. Chicago City Ry. Co.*, 164 Ill. 518; *Chicago & A. R. R. Co. v. Anderson*, 166 Ill. 572.

The general rule that all reasonable presumptions will be entertained in favor of a general verdict, does not apply in aid of special findings. To control the general verdict there must be such antagonism between the special finding and the general verdict that it could not be removed by any evidence admissible under the issues tried by the jury. Hence, in determining that question, the trial court should look not to the evidence heard, but to what could have been heard under the issues.

Under the issues formed by the pleadings in this case, the special interrogatory propounded to the jury did not call for an answer that was controlling. It should have been refused. It nowhere appears from the pleadings that the plaintiff's right to the possession of the property depended upon whether it regained possession of it after it was delivered to Magill & Co., and before it was levied upon by the writs.

The court erred in rendering judgment on the special finding. The judgment will be reversed and the cause remanded, with directions to enter judgment on the general verdict, or set it aside and award a new trial if a motion to that effect is made, and the court is of the opinion that a new trial should be granted. Reversed and remanded.

71 366
174 279

Lewis L. Lehman v. James H. Clark, Receiver.

1. **BENEFIT SOCIETIES**—*Subject to the Act of 1893, in Regard to Assessment Insurance Societies.*—Although the association concerned in this case was organized under the act of 1872 regulating benefit societies, it is embraced within the act of 1893 in regard to companies furnishing insurance upon the assessment plan, and is subject to its provisions.

2. **EVIDENCE**—*Of Membership in Benefit Societies.*—In a suit by the receiver of an assessment insurance association to collect assessments with which to pay death claims, it is not necessary that the certificate of membership of the deceased members be produced; if the records of the association show they were members and were treated as such, that they paid all dues and assessments up to the time of their deaths, and that proofs of deaths had been received and retained by the association without objection, a *prima facie* case is established.

Lehman v. Clark.

3. *BY-LAWS—Approval of Action in Regard to, Held to Amount to Adoption of.*—The records of a benefit society showed that the secretary reported to the board of directors that by-laws had been compiled, revised and printed, and that the secretary's action in relation to by-laws was approved. The law under which the association was operating not providing any particular mode by which by-laws should be adopted, *it was held* that the approval of the action of the secretary was equivalent to a formal adoption of the by-laws by the board of directors.

4. *WRITTEN CONTRACTS—The Rule Prohibiting Variation of by Parol, Applied.*—In a suit by the receiver of a benefit society to collect assessments, the defendant offered to prove a custom, acted upon by the association and individual members, that when a member failed to pay an assessment he should be relieved from further liability as a member. As this was at variance with the application, the constitution and by-laws and certificate of membership, which, taken together, formed the contract, *it was held* that it was an attempt to vary a written contract by parol, and that the offered evidence must be excluded.

Assumpsit, for assessments due an insurance society. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 18, 1897.

HENLEY & HENLEY and J. W. & E. C. CRAIG, attorneys for appellant.

ANDREWS & VAUSE, attorneys for appellee; J. F. HUGHES, of counsel.

OPINION PER CURIAM.

This is an action of assumpsit brought by appellee, as the receiver of the Masonic Benevolent Association of Mattoon, Ill., to recover the amount of assessments made by him as such receiver, against appellant, a member of the association, to cover death losses.

A trial was had upon the declaration, general issue and stipulation allowing any and all defenses to be made under the general issue.

After the evidence was heard the court directed the jury to return a verdict for the plaintiff, which the jury did, fixing the damages at \$158.40. A remittitur for \$19.80 was entered and a judgment rendered for \$138.60.

The case was before this court at the November term, 1895, on an appeal from a judgment sustaining a demurrer to the declaration, and it is reported in volume 65 Ill. App. 238.

In setting out the reasons for holding that the declaration was good, the views of the court are expressed upon nearly all of the points of contention now urged for a reversal of this judgment.

Although the *personnel* of the court, as now organized, differs from what it was then, we adhere to the views then expressed and shall not discuss the points covered by the published opinion.

Although this association was organized under the act of 1872, regulating benefit societies, it is embraced within the act of 1893 and is subject to its provisions, and this court so held in effect when passing upon the sufficiency of the declaration.

Appellant contends that the membership of the deceased members, on account of which the assessments were made, was not properly proven. He insists that the production of their certificates of membership was the proper and only mode by which that fact could be proven.

We are of the opinion it did not devolve upon the receiver to produce such certificates. They are not supposed to be in his possession. If the records of the association showed they were members, and they were treated as such, that they had paid all dues and assessments extended against them up to the time of their deaths, and that proofs of their deaths had been received and retained by the association without objection, a *prima facie* case was established.

To the contention that there is no proof that the by-laws were ever adopted by the association it is sufficient to say that the record of the proceedings of the board of directors of the date June 1, 1886, introduced in evidence, shows "that the secretary reported to the board that the by-laws as they nowstand had been compiled and revised, that he had had five thousand copies printed at cost of \$5.50 per thousand, and that on motion, secretary's action in relation to by-laws was

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approved." The evidence shows that the copy offered upon the trial was one of those printed in 1886 and approved by the board of directors.

The act under which the association was operating at that time did not prescribe any particular mode by which by-laws should be adopted. The approval of the act of the secretary in compiling, revising and publishing the by-laws was equivalent to a formal adoption of them by the board of directors.

It was not necessary to introduce in evidence the bill filed by the attorney-general for dissolution of the association, etc. The recital in the decree as to jurisdiction of the parties and the subject-matter obviated that.

The evidence shows that the assessments were made in accordance with the provisions of the constitution of the association and appellant has no just cause of complaint on that score.

The court was right in refusing to allow appellant to prove that a custom had prevailed and had been acted upon by the association and individual members, that when a member had failed to pay an assessment he should be relieved from further liability as a member.

It was an effort to show an understanding at variance with the application, the constitution and by-laws and certificate of membership, which, taken together, constitute a written contract. In other words it was an attempt to vary by parol a written contract.

We are of the opinion that plaintiff below proved his declaration, and as no valid defense was interposed, the court rightfully directed the jury to return a verdict for plaintiff.

Judgment affirmed.

Eugene T. Miller v. Joseph Simons et al., Ex'rs, and Hope S. Davis.

1. *SET-OFF—Board and Lodging Against Interest.*—As the evidence in this case shows that the plaintiff was boarded and lodged by his father during all the time for which interest is claimed, this court holds that

the trial court properly refused to allow him interest on his claim against his father's estate.

2. FINDINGS BY THE COURT—*Sustained by the Evidence.*—The court reviews the evidence, and holds that it sustains the findings of the trial court, and that the judgment must be affirmed.

3. COUNTY COURTS—*Have Equitable Jurisdiction in the Settlement of Estates.*—In the settlement of estates, the County Court has both legal and equitable jurisdiction in the allowance of money demands, and can pass upon the claim of a partner, against the estate of a deceased partner, for a share of the profits of the partnership business.

Claims in Probate.—Error to the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 13, 1897.

GEO. H. WILSON and J. F. CARBOTT, attorneys for plaintiff in error.

JAMES N. SPRIGG, attorney for defendants in error.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

For many years prior and up to the year 1875, George A. Miller was conducting, in the city of Quincy, Adams county, Illinois, a general drug and book store; from about 1865 until 1875 Eugene T. Miller worked as a clerk for his father in this drug and book store, at \$50 per month. Commencing in 1875, there was conducted in said store building the manufacture of "Aniline" for the retail trade, in addition to the sale of drugs and books; and this continued until the year 1886, with plaintiff in error continuing to work in the store with his father, and some of that time he traveled and sold "aniline," which was manufactured in this store. This drug and book store, both before and after the "aniline business" was added, was conducted in the name of "George A. Miller." From 1875 to 1886 the business done in this store was kept in books of original entry, numbered 1, 2, 3 and 4. These books contained entries made by George A. Miller, the father, and Eugene T. Miller, the son, and some were made by another son, Alexander T. Miller. On January 22, 1888, George A.

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Miller died testate, his last will and testament being dated January 28, 1876, there being a codicil added thereto, dated January 16, 1886. At his death, George A. Miller left a widow named Anna P. Miller, and seven children, named as follows: Alexander T. Miller, Eugene T. Miller, George Miller, Mrs. Fannie Bunting, Mrs. Simons and the two Mrs. Sprague. By his last will and testament George A. Miller named his sons, Eugene T. and Alexander T. Miller, executors, and his widow, Anna P. Miller, executrix, and by the codicil thereto he named his son-in-law, Joseph Simons, one of the executors. All the persons named as executors and executrix qualified as such, shortly after the death of George A. Miller. From the beginning of the administration, Eugene T. Miller, the plaintiff in error and one of the executors, took entire charge of the administration of the estate of his father, and had charge, as such executor, of all the books and papers of said estate (except book No. 4); and he prepared and had filed in the County Court of Adams County such inventory and reports of the estate as were filed. On December 10, 1889, Eugene T. Miller, plaintiff in error, filed in the office of the clerk of the County Court of Adams County two claims, as follows:

ONE CLAIM.

QUINCY, ILL., Jan. 1, 1886.

GEO. A. MILLER Estate,

To Eugene T. Miller,

Dr. for one-half the profits of the "Aniline Business," as per statement attached:

Cash Aniline profits.....	\$20,958 50
Mdse. Aniline profits.....	5,461 63
	<hr/>
	\$26,420 13
Less half.....	\$13,210 06

Interest	\$13,210 07
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As the entire cash proceeds of this business were drawn and used by George A. Miller for his own purpose, legal

interest is claimed on the amount, which should have been paid to E. T. M. from time to time. It was the agreement that E. T. Miller should have a salary of one-half the profits of the aniline business.

Aniline Business from January 1, 1875, to January 1, 1886.

GROSS SALES ANILINE.

Cash Sales	1875	\$11,738	85	
" "	1876	5,924	85	
" "	1877	5,875	15	
" "	1878	3,940	40	
" "	1879	2,643	30	
" "	1880	3,270	43	
" "	1881	3,496	30	
" "	1882	4,007	45	
" "	1883	3,784	95	
" "	1884	990	95	
" "	1885	331	75	\$46,004 40

Stock and Expenses	1875	\$4,699	16	
" "	1876	3,451	40	
" "	1877	2,416	00	
" "	1878	2,095	55	
" "	1879	1,267	00	
" "	1880	1,750	15	
" "	1881	1,896	90	
" "	1882	1,953	95	
" "	1883	1,951	35	
" "	1884	411	50	
" "	1885	515	60	\$22,408 55

Deduct G. A. M. Personal..\$ 87 50

Entered by Error..... 648 15

735 65

Gross Expense Account..... \$21,672 90

Net Profit.....\$24,331 50

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LIABILITIES.

Back rent due G. A. M. agreed \$3,300 for room 11 years.
 Cash due G. A. M. Jan. 1, '75.....\$ 73 00
 Original capt..... 3,373 00

Cash aniline profit.....\$20,958 50

Stock (taken in trade for aniline.)

Exchange to Missouri land, 1885.....\$1,600 00
 Merchandise to family 11 years..... 500 00 agreed
 On hand Dec. 31, 1885..... 3,461 63

\$5,561 63

LIABILITIES.

Aniline stock from G. A. M.....\$ 100 00

Stock profit\$5,461 63

This statement is from the records of the business as kept from year to year, except rent and merchandise to G. A. M. family. The stock item disposed of above, and on hand, represents stock accumulated in the progress of the aniline business and none other.

PROFITS OF THE ANILINE BUSINESS TO JAN. 1, 1886.

Drawn by G. A. M. cash to Hampshire St. prop-
 erty.....\$ 6,755 14
 “ “ “ “ “ Dills building, vari-
 ous dates..... 4,694 25
 “ “ “ “ “ Mill in fall of 1879. 1,549 90
 “ “ “ “ “ Alex. T. Miller, Feb.
 1879..... 3,200 00
 “ “ “ “ “ Alex. T. Miller, Mar.
 10, 1884..... 6,020 00
 “ “ “ “ “ in safe Dec. 31, 1885.. 239 25
 “ “ “ “ Mdse. to Missouri land May,
 1885..... 1,600 00
 “ “ “ “ “ on hand Dec. 31, 1885 3,461 63

\$27,520 17

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The last two items of merchandise represents merchandise accumulated in the progress of the aniline business and no other."

Affidavit of Eugene T. Miller to the foregoing claim, stating the sum of \$13,207.10 to be due and unpaid.

Other claim of Eugene T. Miller against the estate of George A. Miller, deceased :

"QUINCY, ILL., Jan. 1, 1886.

Estate of George A. Miller to Eugene T. Miller.

Dr.

1875.

Jan 1, to cash.....\$6,000 00

Cr.

1875, By cash.....\$ 57 95

1876, " " 46 30

1877, " " 45 00

1878, " " 37 00

1879, " " 88 00

1880, " " 117 55

1881, " " 30 75

1882, " " 60 00

1883, " " 45 35

1884, " " 44 00

1885, " " 76 25 648 15

\$5,351 85

Legal interest is claimed on the above, as usually calculated, from January 1, 1875.

Affidavit of Eugene T. Miller of December 10, 1889, to the foregoing claim, stating \$5,351.85, with interest, to be due and unpaid."

These claims were heard in the County Court of Adams County, at the March term thereof, 1891, and resulting in that court allowing claimant the sum of \$6,000, to be paid him out of said estate, in due course of administration, as a claim of the seventh class. From this order of the said County Court, claimant, Eugene T. Miller, appealed to the Circuit Court of Adams County, where a trial was had

July 9, 1891, on said claims, before the court, without a jury, and said Circuit Court found that the claimant, Eugene T. Miller, was entitled to recover on his said \$6,000 claim, from the estate of George A. Miller, deceased, the sum of \$5,400, and no more, and allowed said amount to him against said estate, as a claim of the seventh class, to be paid in due course of administration; "and as to the said claim of \$13,210.09 and interest, the Circuit Court ordered and adjudged that the same be and is hereby dismissed by the court for want of jurisdiction." From which findings and judgment of said Circuit Court, plaintiff in error brings this case to this court on writ of error, sued out July 3, 1896. On the trial of these claims in the Circuit Court, the will of George A. Miller was offered in evidence by claimant, and admitted without objection—the material parts of which will are as follows:

Last will of George A. Miller.

"I, George A. Miller, of Quincy, in the county of Adams and State of Illinois, do hereby make and declare this, my last will and testament.

First. It is my will that my funeral expenses and all just debts be fully paid.

Second. I give, devise and bequeath unto my beloved wife, Anna P. Miller, and my sons, Eugene T. Miller and Alexander T. Miller, all my estate, real, personal and mixed, and wheresoever situated, but in trust for the following uses and purposes, namely: first, to carry on, for such period as they may deem best, the business in which I may be engaged at the time of my decease; and I hereby appoint my said wife, Anna P. Miller, and my sons, Eugene T. Miller and Alexander T. Miller, executors of this will, the survivor or survivors of them to act as well in the capacity of executors as that of trustees herein; my said executors and trustees may, if they deem it proper, sell any or all of the premises and property hereby bequeathed to them, in trust as aforesaid—it being my will that all said property, so held in trust, shall be for the benefit of each and all of my children alike, share and share alike, it not being my wish to make any distinction among my children.

Third. It is my will that my said trustees and executors, or the survivors of survivor of them, be exempted from giving bonds as such executors and trustees, nor shall they or any of them, be entitled to any fees as such, and they shall have power to collect all dues to my estate, make all needful and just payments and settlements of claims against my estate, to close out the business, either in whole or in part, as it may seem best for the interest of the estate. And my said executors, or the survivors of them, upon the decease of my said wife, shall divide all the remainder of my estate, share and share alike, among all my children, including the said Eugene T. and Alexander T. Miller—the descendants of any deceased child taking the share of their deceased parent, if there be more than one, and if only one, such one taking the whole share of his or her deceased parent.

Fourth. It is my will, anything hereinbefore to the contrary notwithstanding, that my wife shall have, for and during her natural life, my store property on the corner of Sixth and Hampshire streets, and my homestead property on Kentucky street, in Quincy, Illinois; *the income from said property which may remain unexpended by my said wife;* my lots on Twelfth street, Quincy, Illinois, and all other real and personal property, not including my said store and homestead, *shall, if need be, used first as my said executors, or the survivors or survivor of them may think best, to pay off the debts due to my two sons, Eugene T. and Alexander T. Miller, or other debts, if any, or dividends under this will.*

Claimant also offers in evidence entry on page 112, of book No. 4, of the store books of George A. Miller, which is as follows:

“Page 112, book 4. Personal account—E. T. M. to G. A. M. 1875.

Jan.	\$ 16 55
Feb.	1 50
Mch.	3 25
June.	6 00
July.	9 15

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Aug.....	11 40
Sept.....	2 35
Oct.	4 85
Nov.....	5 25
Dec.....	3 65
1876.....	46 30
1877.....	45 00
1878.....	37 00
1879.....	88 00
1880.....	117 55
1881.....	30 75
1882.....	60 00
1883.....	45 55
1884.....	44 00
1885.....	76 25

\$648.15"

And books Nos. 1, 2, 3 and 4 were introduced also in evidence by claimant, and were admitted by defendants below, defendants in error here, as the books of original entry of G. A. Miller, deceased, that they were correct, and represented the eleven years of business in question.

Pages 131 and 133, book 4, contained two statements of George A. Miller, headed, "To whom it may concern," which are as follows:

Page 131, Book 4.

"To whom it may concern,

QUINCY, ILL., January 1, 1886.

This is my view and understanding of the business between Eugene and myself. Although there has been no written or other expressed understanding at the commencement, it is evident to all parties who have known anything about it that we are doing business as partners; every act of ours, collectively or individually, shows and confirms it; each and either of us assumed and exercised ownership over the business and its property, and there is nothing in law or justice to the contrary; as to the property acquired in the course of the business each one of us is fully equally responsible for, whether it was with or without the consent of the

other, as there was no limit or guide to our operations in any way, each one traded as he thought best with the means and property of the concern, for the concern, and now in regard to the final settlement of this business, up to January, 1886 (eighteen eighty-six). I agree to divide the net assets on hand this first day of 1886. See page 128.

Although Eugene has given me all share or interest he may have in the business by his receipt in full, I except the gift.

But, nevertheless, hold myself and administrators ready to give him it or its equivalent back to him.

GEORGE A. MILLER."

Page 133, Book 4:

"To whom it may concern:

QUINCY, ILL., January 1, 1886.

In settling with Eugene, you must understand that the six thousand dollars I owe him has nothing to do with our partnership business; his account previous to 1875 should be deducted, which account is between six and seven hundred dollars.

Now, if he wishes interest allowed him on the six thousand dollars, then charge him for board, washing and other privileges and attentions just as much as he charges interest. I never expected him to charge interest, and so long as he boards at home and is not paid his six thousand dollars, so long shall he allow the interest for his board. In regard to the six thousand dollars, my intention and idea was and is, that he is to have just six thousand dollars more than an equal share of my estate for and in full of all claims.

GEORGE A. MILLER."

The testimony on the trial in the Circuit Court also shows that plaintiff in error, in the latter part of 1885, or the first part of 1886, executed and delivered to his father a writing, being a receipt in full for his share or interest in the "Aniline Business;" and that after his father's death he (plaintiff in error) destroyed it. No proposition or propositions of law were presented to the court below, by either side, to be held or refused as the law of this case.

In this court, the plaintiff in error assigns numerous errors on the record; and the defendants in error also assign numerous cross-errors on the record.

Plaintiff in error, under his errors assigned, insists, in his briefs filed in this court, first, that the lower court erred in not allowing him legal interest from January 1, 1875, on the \$5,400 allowed him on his \$6,000 claim. But we think, inasmuch as the evidence shows that he was boarded and lodged by his father from January 1, 1875, until the death of his father, that no interest on that sum ought to have been allowed him, hence the Circuit Court committed no error in not allowing interest to him on that claim. Plaintiff in error insists, second, that the lower court erred in dismissing his \$13,210 claim, for his one-half of the profits of the "Aniline Business," from 1875 to 1886. But, from all the evidence, when carefully considered, it does not satisfactorily appear to us, that after considering and allowing the necessary expenses incurred in conducting that business, the fair allowance for the capital and store-house, furnished by his father in conducting the business, and the cost of the material furnished in compounding the dye stuffs used in that business, there was any profit to be divided between his father and himself; the burden of showing profits to be divided was upon plaintiff in error, as claimant, in the court below. Hence, the Circuit Court committed no error in dismissing this claim. As we view it, it makes no difference whether we consider plaintiff in error as a partner, or as a clerk of his father in the "Aniline Business," because the County Court in trying the claims of plaintiff in error against his father's estate, under its equitable as well as legal powers, had jurisdiction whether the claim for half the profits of the "Aniline Business" was as partner, or clerk. In the case of *James P. Westbay v. Robert E. Y. Williams*, 5 Ill. App., at page 528 of the opinion, this court, by Higbee, J., said: "In the settlement of estates, the County Court has both legal and equitable jurisdiction in the allowance of money demands." See also *Moore v. Rogers*, 19 Ill. 347; *Dixon v. Buell*, 21 Id. 203; *In re Steel*, 65 Id. 322; *Brandon v. Brown*,

106 Id. 519; Schlink v. Maxton, 153 Id. 447. And as the County Court had jurisdiction, then on appeal to the Circuit Court, that court likewise had jurisdiction.

Defendants in error, under their cross-errors assigned, insist that the court below erred in allowing plaintiff in error \$5,400 on his \$6,000 claim. First, because they say the statute of limitations applies, that claim being more than five years old. We think there is sufficient evidence to take this claim out of the statute of limitations, contained in the last will and testament of George A. Miller, quoted above, and the written statement in the handwriting of, and signed by George A. Miller, dated Quincy, Ill., January 1, 1886, on page 133, of book 4, together with the testimony given by the various witnesses on the trial of this case. Defendants in error, secondly, insist that plaintiff in error is bound by the receipt in full which he gave his father, and which, after it came into his hands as executor, he destroyed, hence, it was error in the court below to allow him \$5,400 on his \$6,000 claim. We can not come to that conclusion, because George A. Miller, in his written statement on page 131, book 4, dated Quincy, Ill., January 1, 1886, referring to this receipt, says: "Although Eugene has given me all share or interest he may have in the "Aniline Business," by his receipt in full, I (accept) except the gift." Hence, we know, although the receipt was destroyed, that it was a receipt for Eugene's interest, or claim in the "Aniline Business," and did not include the money due him on the \$6,000 claim. Therefore, finding no error in this record, we affirm the judgment of the Circuit Court herein, with costs to plaintiff in error. Judgment affirmed.

People, etc., Use, etc., v. Amanda E. Lease, Ex'x, et al.

1. *WILLS—A Distributee May Elect to Take in Money Funds Directed to be Invested in Land.*—Where a testator directs that the share of one of the distributees shall be invested in land, the title to vest in the distributee absolutely, such distributee has the right to elect to take his share in money.

2. RES JUDICATA—*Action of County Court on Final Report of an Executrix.*—Where an executrix renders a final report to a County Court, thus submitting herself to the jurisdiction of the court, if the court has jurisdiction of the subject-matter and of a distributee, its judgment is final and conclusive as between such distributee, and the executrix and the sureties on her bond, unless reversed or set aside for fraud or mistake. In such a case if the executrix prior to the final settlement holds notes of such distributee, which he ought to pay, she should then and there claim a credit, and if she fails to do so she can not present them as a set-off in a suit for the amount found to be due on the settlement.

3. PLEADING—*Certain Questions Held Not Raised by the Pleadings in This Case.*—As to the contention that a certain conversation should operate as an estoppel *in pais* against appellant objecting to having certain notes deducted from his distributive share of his father's estate, and the contention that appellee did not receive notice of appellant's election to receive the share of the estate in money until after she had taken such steps in purchasing real estate as prevented the exercise of such right of election, the court holds that no proper pleadings were filed warranting the court in hearing evidence of, or permitting such deduction.

Debt, on the bond of an executrix. Appeal from the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 18, 1897.

J. M. TRUITT and D. H. ZEPP, attorneys for appellant.

There can be no question that where a testator directs that the share of one of the distributees shall be invested in land, the title to vest in the distributee absolutely, such distributee has the right to elect to take his share in money.

The whole doctrine is well stated in *Craig v. Leslie*, 3 Wheat. 563. "Thus where the whole beneficial interest in the money in the one case, or the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elects to do so, before conversion has actually been made, and this election he may make as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election and not the mere right to make it, which changes the character of the estate so to make it real or personal, at the will of the party entitled to the benefi-

cial interest." 3 Pomeroy's Eq. Juris., Secs. 1175, 1176, 1177 and notes; Baker v. Copenbarger, 15 Ill. 103; Jennings v. Smith, 29 Ill. 116; Ridgeway v. Underwood, 67 Ill. 419; Nicoll v. Scott, 99 Ill. 529; Ebey v. Adams, 135 Ill. 80; Heslet v. Heslet, 8 Ill. App. 22; Burr v. Sim, 1 Whart. (Penn.) 252; 29 Am. Dec. 48; Proctor v. Ferebee, 1 Iredell's Eq. (N. C.) 143.

The six promissory notes, amounting to \$580.14, should not have been allowed to go in evidence, because said notes were or should have been included in the final settlement of the estate of Leonard Lease, deceased. Therefore defendants were estopped by the final order of the County Court, from using said notes as a matter of defense to this suit. We think an examination of the authorities will fully sustain our contention.

The County Court is a court of general and unlimited jurisdiction in matters of administration, with equitable powers adapted to its mode of proceeding. Moffitt v. Moffitt, 69 Ill. 641; Spenser v. Boardman, 118 Ill. 555; Propst v. Meadows, 13 Ill. 157; Reynolds v. The People, 55 Ill. 328; Moore v. Rogers, 19 Ill. 347; Dixon v. Buell, 21 Ill. 203; In re Stéele, 65 Ill. 322; Brandon v. Brown, 106 Ill. 519; In re Corrington, 124 Ill. 363; Matthews v. Hoff, 113 Ill. 96; Housh v. The People, 66 Ill. 178.

And being a court of general jurisdiction, liberal intentions will be made in favor of its orders and judgments. People v. Stacy, 11 Ill. App. 506; Bostwick v. Skinner, 80 Ill. 147; Moffitt v. Moffitt, 69 Ill. 641; Anderson v. Gray, 134 Ill. 554; Ide v. Sayer, 30 Ill. App. 216; Blair v. Sennott, 35 Ill. App. 368, 134 Ill. 78.

They have all the conclusiveness of other final judgments. Paullissen v. Looek, 38 Ill. App. 510; 1 Woerner's Law of Adm'n, Sec. 145; 2 Black on Judgments, Sec. 633.

And where the County Court approves a final report it is conclusive on the parties in collateral proceedings. Ammons v. People, use, etc., 11 Ill. 6; Ralston v. Wood, 15 Ill. 159; Housh v. People, use, etc., 66 Ill. 178; Frank v. People, use, etc., 147 Ill. 105; People, use, etc., v. Stacy, 11 Ill. App. 506.

It is well settled that the principle of *res judicata* embraces not only what has been determined in a former case, but also extends to any other matter properly involved, and which might have been raised and determined in it. *Kelly v. Donlin*, 70 Ill. 378; *Hamilton v. Quimby*, 46 Ill. 90; *Rogers v. Higgins*, 57 Ill. 244; *Bailey v. Bailey*, 115 Ill. 551; 1 *Herman on Estoppel*, 301; 21 *Am. and Eng. Enc. of Law*, 216 and 217.

The purpose and object to be accomplished by a final settlement of an estate is to ascertain that all the debts have been paid, and to judicially determine who are the distributees of the estate and the amount to be paid to them respectively, and if any of the shares are to be paid to trustees, or otherwise invested for the use of the distributees, the final order should so direct. Where there are minor distributees, the final order always directs that the shares of such shall be paid to their guardians. If one or more of the distributees owe the estate, such indebtedness is assets of the estate, which it is the duty of the executor or administrator to collect, and if not in fact collected the same should be deducted from the share of the distributee owing the same. *Howland v. Heckscher*, 3 Sand. Ch. (N. Y.) 519.

HOWETT & JETT, attorneys for appellees.

The devise to Jacob H. Lease, the appellant in this case, was real estate only, and has never been personal property or money, nor had he the right to elect to take the devise in money. From the day of the death of the testator, it became at once a devise of real estate. *Hawley v. James*, 5 Paige, 448; *Redfield on Wills*, Vol. 3-139; *Collins v. Champ's Heirs*, 15 B. Monroe (Ky.) 118.

The test of a conversion of this character is as the will or deed directed that conversion to be made. In order to work a conversion while the property remains unchanged in form, there must be clear and imperative directions to convert it. *Haward v. Peavey*, 128 Ill. 430.

Money directed to be laid out in land must be considered as real estate. *Phillips v. Ferguson*, 17 Am. St. Rep. 78.

Money and other personal property directed and agreed to be laid out in the purchase of land becomes and is regarded as land in equity. It will therefore pass under a general devise of lands or of real estate; it will descend to the heir and will not be included in the bequest of money or personal property. Pomeroy's Equity Jurisprudence, Vol. 3, Sec. 1165.

MR. JUSTICE BURROUGHS DELIVERED THE OPINION OF THE COURT.

On April 26, 1892, one Leonard Lease, the father of Jacob H. Lease, the appellant, and Amanda E. Lease, one of the appellees, died testate, and by his last will and testament he appointed the said Amanda E. Lease executrix thereof, and by the seventh clause thereof gives, devises and bequeaths all the residuary estate he owned to his wife, Mary Lease, and his five children, one of whom was the said Jacob H. Lease, "to be equally divided between each and all of them in the following manner, each and all to have their share, and put it to their own use and benefit as they see fit, with the exception of my son, Jacob H. Lease; it is my request that my executrix invest his share of my estate, as above stated, in real estate in Montgomery county, Illinois, to be selected by my said executrix according to her best judgment, and deeded to him for his sole use and benefit so long as he lives, and then to his lawful heirs."

Amanda E. Lease, on the 19th day of May, 1892, qualified before the County Court of Montgomery County, Illinois, as such executrix, giving the usual official bond as such executrix, and thereupon proceeded to administer the estate of her father.

At the November term, 1894, of the Circuit Court of Montgomery County, Illinois, said Amanda E. Lease, as such executrix, filed her bill in chancery against said Jacob H. Lease, to construe the said seventh clause of her father's will, relating to the investment of her brother Jacob's share of said estate, and that court decreed that she invest his share of that estate in real estate in said Montgomery

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county, to be selected by her according to her best judgment, and that she deed or cause to be deeded said real estate to said Jacob H. Lease in fee simple absolute.

On May 1, 1894, Amanda E. Lease made a settlement with her sisters, who were a part of the residuary legatees under her father's will, in which she paid them each \$4,849.20 as their part of the residuary estate of her father under said will. But her brother, Jacob H. Lease, would not accept said sum in full of his share under said will. On January 10, 1895, she filed in said County Court her final report, showing the distributive shares of said residuary legatees to be \$4,849.20 each. This report was objected to by her brother Jacob, resulting in various amended reports being filed by her as such executrix in said County Court, until December 2, 1895, when she filed in said County Court her last final report as such executrix, in which she states as follows:

"She further reports that the debts and claims against said estate have all been paid, leaving the above balance to be distributed between the heirs lawfully entitled thereto, as follows:

To the estate of Mary Lease, widow of Leonard Lease, deceased.....	\$5,367.58
To Mary E. Hammond, daughter of Leonard Lease, deceased.....	5,367.58
To Eliza J. Stewart, daughter of Leonard Lease, deceased.....	5,367.58
To Belle L. Henkel, daughter of Leonard Lease, deceased.....	5,367.58
To Jacob H. Lease, son of Leonard Lease, deceased	5,367.58
To Amanda E. Lease, daughter of Leonard Lease, deceased	5,367.58
The distributive share of Jacob H. Lease is.....	5,367.58
With interest added.....	446.85

\$5,814.43

She now moves the court that she may be allowed to make distribution as above set forth, and having made and

taken receipts therefor and presented to this court, asks to be discharged. All of which is respectfully submitted."

Which report is signed by Amanda E. Lease, with her affidavit of its correctness attached.

On December 21, 1895, said County Court made its order on said report, as follows: After reciting the filing of said report and the publication of notice of the final settlement of said estate, and that a balance of \$32,205.47 remained in the hands of said executrix, to be distributed to the heirs lawfully entitled thereto, closed as follows: "It is therefore ordered by the court that said executrix pay to the heirs and distributees the balance due them as shown by said report, and upon her filing their receipts in full for such amounts, she will be discharged. Said report is approved by the court and ordered filed and recorded."

On the hearing in the County Court when its said order was made, both Amanda E. Lease and Jacob H. Lease were parties and present, and took part and were represented by attorneys.

On January 25, 1896, Amanda E. Lease served on the attorneys of Jacob H. Lease, a notice in writing, as follows: "To JACOB H. LEASE, Nokomis, Illinois.

You are hereby notified that on the 30th day of December, 1895, I caused to be purchased from Albert Eckhoff and wife the north half of the east quarter of section one (1), township nine (9) north, range two (2), west of the third P. M., in Montgomery county, Illinois, containing eighty acres, for a consideration of three thousand dollars; that on the 30th day of November, 1895, I caused to be purchased from George Bliss and wife, the east half of the southeast quarter of section thirty-one (31), township ten (10) north, range one (1) west, Montgomery county, Illinois, for consideration of twenty-six hundred fifty dollars, both of which deeds were executed to you in compliance with the terms and conditions of the will of the late Leonard Lease, deceased, and also in compliance with the terms of the decree of the Circuit Court, rendered at the November term, 1894, construing said will, and that such lands were

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purchased by me as executrix of the last will and testament of Leonard Lease, deceased, investing your distributive share in said estate as per said will and decree above mentioned.

I decline, under the provisions of said will and decree, therefore, to pay to you your distributive share in money, as said distributive share has before this time, as aforesaid, been invested in real estate, and as soon as possible abstracts of title will be prepared thereto, when I shall tender to you said deeds above mentioned, together with abstracts of title therefor.

AMANDA E. LEASE,
Executrix of the last will and testament of Leonard Lease,
deceased.”

On February 13, 1896, Jacob H. Lease served upon Amanda E. Lease the following demand in writing :

“Amanda E. Lease, executrix of the estate of Leonard Lease, deceased.

I hereby demand payment of the amount due me as my distributive share of the estate of Leonard Lease, deceased.

JACOB H. LEASE.

February 13th, 1896.”

On March 17, 1896, Jacob H. Lease commenced in the Circuit Court of said Montgomery County this suit, upon the said official bond of said Amanda E. Lease, as executrix of her father's will.

The declaration is in the usual form of debt on an executrix's bond, and avers the filing of the final report of said Amanda E. Lease, as such executrix in the said County Court, in which it shows the distributive share of Jacob H. Lease to be \$5,814.43, and the order of the said County Court, ordering her to pay him the same, and a demand made by him on her to pay him said amount, and her refusal to pay it to him. To this declaration the defendants in the court below (appellees here) interposed the following pleas :

First, plea by defendant Amanda E. Lease, as executrix, etc., is a plea of performance.

Second, plea by defendant Amanda E. Lease, sets up that in and by the bond sued on, she was bound to fulfill the

duties and conditions imposed upon her by the will of Leonard Lease, deceased, in which will it was expressly provided that said sum of money in the declaration mentioned should be by this defendant invested in real estate in Montgomery county, to be by her selected according to her best judgment, and that this defendant did invest said sum of money, in the declaration mentioned, in real estate in Montgomery county, Illinois, selected by her as in said will provided.

Third, plea by defendant Amanda E. Lease, executrix, etc., sets up that said sum, in the declaration mentioned, was due the defendant under the terms and conditions of the last will and testament of said Leonard Lease, deceased, and from no other source. And that, by the terms of said will, this defendant was expressly directed to invest said sum of money in real estate in Montgomery county, to be by her selected according to her best judgment, and that she did, on, to wit, November 30, 1895, and on January 6, 1896, before the commencement of this suit, so invest said money, as directed in said will; and that she afterward, to wit, on March 21, 1896, was ready and willing, and tendered and offered to the plaintiff, title deeds of the real estate so purchased by her for him, together with all costs of this suit to that date, but that the plaintiff refused to receive the same; and that the defendant, Amanda E. Lease, now brings the said title deeds with costs, so tendered herein to court, ready to be delivered to plaintiff if he will accept the same.

Fourth, plea by defendants, Thomas J. Whitting, John Marley, Fred Law, Jacob Sweney and John Carstens, is a plea of general performance of the said condition of said bond by defendant Amanda E. Lease, executrix, etc.

To these pleas, plaintiff in court below (appellants here), filed the following replications :

PLAINTIFF'S REPLICATIONS.

1. Plaintiffs, as to the first and fourth pleas by the defendants pleaded, deny that the said Amanda E. Lease has performed all the conditions of the said writing obligatory.

2. Plaintiffs deny that the said Amanda E. Lease invested the said sum of money in the said declaration mentioned in real estate in Montgomery county, Illinois, as alleged in her second plea.

3. To the second plea plaintiffs further reply that Amanda E. Lease did not invest the distributive share of the said Jacob H. Lease in the estate of Leonard Lease, deceased, in real estate in said county, reasonably equal in value to said distributive share and close with the proper verification.

4. As to said second plea, plaintiffs say that the said supposed real estate in said county was purchased by the said Amanda E. Lease, at a price greatly in excess of the true value thereof, with intent thereby to wrong and injure the said Jacob H. Lease, and offer to verify.

5. As to the said second plea, plaintiffs say that when Amanda E. Lease purchased said supposed lands she did not procure a good and sufficient merchantable title thereto, and this they are ready to verify, etc.

6. As to said second plea, plaintiffs say that said supposed lands in said plea mentioned are not free and clear of all incumbrances, and this they are ready to verify.

7. And for further replication to said second plea, plaintiffs say that before the said Amanda E. Lease invested said sum of money in plaintiffs' declaration mentioned, or any part thereof, in the said supposed real estate, and gave the said Jacob H. Lease notice thereof, the said Jacob H. Lease had elected to convert the devise of real estate made in his favor by the said Leonard Lease, deceased, in and by his last will and testament, and take the same in money, of all which the said Amanda E. Lease had due notice, and this they are ready to verify.

8. As to said third plea, plaintiffs deny that Amanda E. Lease invested said sum of money in the said declaration mentioned in real estate, etc.

9. As to said third plea, plaintiffs say the said Amanda E. Lease did not invest the said sum of money in plaintiffs' declaration mentioned in real estate reasonably equal in

value to the said sum as in and by said supposed last will and testament it was her duty to do, and this they are ready to verify, etc.

10. As to said third plea, plaintiffs say that Amanda E. Lease purchased said supposed lands at a price greatly in excess of the market value thereof, with intent to cheat, wrong and injure the said Jacob H. Lease, and offer to verify, etc.

11. As to said third plea, plaintiffs say that when the said Amanda E. Lease purchased the said supposed real estate she did not procure a good and sufficient title thereto, and offer to verify, etc.

12. As to said third plea, plaintiffs say that said supposed lands are not free and clear of incumbrances, by reason whereof the said Jacob H. Lease ought not to be required to accept the same, and offer to verify, etc.

13. As to said third plea, plaintiffs say that before the said Amanda E. Lease tendered to the said Jacob H. Lease title deeds to said supposed lands, the said Jacob H. Lease had elected, as he had a right to do, to reconvert the devise made to him by the said Leonard Lease in and by his last will and testament, and take the same in money, of all which the said Amanda E. Lease had notice, before she tendered said deeds as alleged in said plea, and offer to verify, etc.

14. As to the said third plea, plaintiffs say the said Amanda E. Lease did not tender the title deeds mentioned in said plea until long after the commencement of this suit, and of this the plaintiffs put themselves upon the country.

15. As to said third plea, plaintiffs say that the said Amanda E. Lease did not tender title deeds to the said Jacob H. Lease for real estate in which the said sum of money in the said declaration mentioned was invested, as in said plea alleged, and of this the plaintiffs put themselves upon the country.

February 12, 1897, demurrer to plaintiffs' sixth, seventh and thirteenth replications.

February 12, 1897, demurrer sustained to the seventh and thirteenth replications, and plaintiffs excepted and overruled as to the sixth replication.

Rejoinders (1) and (2) traversing plaintiffs' first and second replications.

Rejoinders (3), (4) and (5) traversing plaintiffs' third, fourth and fifth replications.

Rejoinder (6) to plaintiffs' sixth replication by Amanda E. Lease, "because she says that the lands so purchased by her and in which the said distributive share of the said Jacob H. Lease was invested, were at the time of the purchase thereof, free and clear of all valid existing incumbrances," and of this she puts herself upon the country.

Rejoinder (7) joining issue upon plaintiffs' eighth replication.

Rejoinder (8) traversing plaintiffs' ninth replication.

Rejoinder (9) and (10) traversing plaintiffs' tenth and eleventh replications.

Rejoinder (11) by Amanda E. Lease to plaintiffs' twelfth replication, because she says that at the time of the purchase of said lands, said lands were free and clear of any valid existing incumbrances, and of this she puts herself upon the country.

Rejoinder (12) joining issue upon plaintiffs' fifteenth replication.

Additional replications:

19. As to said third plea, plaintiffs say that the said Amanda E. Lease did not tender to said Jacob H. Lease title deeds to real estate in Montgomery county, Illinois, in which she had invested the sum of money in the plaintiffs' declaration mentioned, as alleged in said plea, and of this they put themselves upon the country.

20. As to said second plea, plaintiffs say that a part of the said supposed lands in said plea mentioned, to wit: N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ Sec. 1, town 9, range 2, west, at the time when the said supposed title deed thereto was tendered to the said Jacob H. Lease, was and now is not free and clear of all incumbrances, and this the plaintiffs are ready to verify, etc.

21. As to said third plea, plaintiffs say that a part of the said supposed lands in said pleas mentioned, to wit: N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, Sec. 1, town 9, range 2 west, at the time when

the said supposed title deed to said land was tendered to the said Jacob H. Lease, was and now is not free and clear of all incumbrances, and this the plaintiffs are ready to verify, etc.

22. As to the said third plea as amended, plaintiffs say that before the said Amanda E. Lease tendered the said title deeds, he, the said Jacob H. Lease, who then and there had a whole beneficial interest in the said devise of real estate mentioned in said plea, elected, as he had a right to do, to reconvert the said devise of real estate made in his favor by the said Leonard H. Lease in his last will and testament, and take the same in money, of which election the said Amanda E. Lease had notice before she tendered said deeds, and this plaintiffs are ready to verify, etc.

23. As to the said amended third plea, plaintiffs say that the said Amanda E. Lease did not bring said deeds and costs into court here until the 16th day of February, 1895, the day said case was set for trial, and offer to verify, etc.

24. As to said third plea, plaintiffs say that said Amanda E. Lease did not, on the 21st day of March, 1897, tender to said Jacob H. Lease all the costs of this suit to that date, as alleged in said plea, and of this the plaintiffs put themselves upon the country.

Plaintiffs demur to defendant's rejoinders six, ten and eleven. Demurrers overruled and plaintiffs except. Plaintiffs demur to defendant's third plea as amended. Demurrer overruled and plaintiffs except.

Defendants tender in open court to said plaintiffs the sum of ten dollars as a tender in this case.

Defendants' demurrer to plaintiffs' twenty-second and twenty-third replications sustained, and plaintiffs except.

Rejoinder by defendant Amanda E. Lease, joining issue on plaintiff's nineteenth replication.

Rejoinders of Amanda E. Lease, to plaintiffs' twentieth and twenty-first replications, because, she says, that at the time of the purchase of said lands and the tender of the title deeds thereof to the plaintiff, said land was free and clear of all incumbrances, and of this she puts herself upon the country.

Trial by the court without a jury.

The court finds the issues in favor of the defendants and against the plaintiffs; plaintiffs move the court for a new trial, which motion is overruled; judgment on the findings of the court against the plaintiffs, and that Jacob H. Lease, pay the costs of this suit; to all of which findings, rulings and judgment so entered, made and rendered by the court as aforesaid, the said plaintiff, Jacob H. Lease, enters his exceptions and prays an appeal to the Appellate Court of the Third District of Illinois, which is allowed, etc.

As we view this case, we are compelled to reverse the judgment of the trial court herein, and remand this case for a new trial for at least two reasons; the first is, because, by the rulings of the trial court in settling the pleadings, in admitting and rejecting evidence, and in refusing to hold certain propositions of law, to be the law of the case, it denied the appellant the right to plead or show he had elected to take his distributive share of his father's estate under the provisions of his will, in money instead of land; while we hold the law to be, that appellant had that right, and had right by proper pleadings and evidence to show in the court below, if he could, that he had so elected, and to plead and show if he could that appellee Amanda E. Lease had notice of his so electing, before she invested his share of said estate in land, as directed by said will. *Baker v. Copenbarger*, 15 Ill. 103; *Ridgeway et al. v. Underwood et al.*, 67 Ill. 419; *Ebey et al. v. Adams et al.*, 135 Ill. 80; and *Craig v. Leslie*, 3 Wheat. 563.

Our second reason is: Because the court below, by its findings, rulings on evidence and its judgment, held that the notes of appellant, admitted in evidence and amounting to \$580.14, were a proper credit on the distributive share of appellant in the estate of his father, as shown by the final report of the executrix of said will and the order of the County Court, made after a hearing of said final report. While we hold the law to be that, as appellee, Amanda E. Lease, and appellant, Jacob H. Lease, were parties to the record in said County Court as to its adjudication on the

final report of said appellee as executrix of said will, they are both bound by that adjudication. Propst, Ex'r, etc., v. Meadows, 13 Ill. 157; Hanna et al. v. Yocum, 17 Ill. 387; Reynolds v. The People, 55 Ill. 328; Schlink v. Maxton, 153 Ill. 447, and Pike et al. v. City of Chicago, 155 Ill. 656. Where the County Court approves a final report of an executor, administrator or guardian, it is conclusive on the parties thereto in collateral proceedings, except for fraud or mistake. Ammons v. The People, use, etc., 11 Ill. 7; Gillett v. Wiley, 126 Ill. 310, and Kattelman v. Estate of Guthrie, 142 Ill. 357. In the last case our Supreme Court says: "In Ralston v. Wood, 15 Ill. 168, when the Probate Court has determined that there was due from the administrator to one of the heirs of the estate a certain sum, which the administrator was ordered to pay over to that heir, it was held that an order of a Probate Court to an administrator to pay over money in his hands to an heir is conclusive, and, if not complied with, entitles the person in whose favor it is made to recover upon the administrator's bond against the principal and security. So, in Gillett v. Wiley, 126 Ill. 310, it was held that an order of the County Court, finding the sum in a guardian's hands belonging to his ward after the majority of the latter, and ordering its payment to the ward, is conclusive upon the guardian and his surety, except for fraud or mistake as to the amount then actually in the hands of the guardian. The same doctrine has been held in other States. See Garton v. Botts, 73 Mo. 274; Sheetz v. Kirtley, 62 Id. 417."

Here the executrix was before the County Court in person, and rendered her final account as such executrix, thus submitting herself to the jurisdiction of the court; the court had jurisdiction of the subject-matter, and of appellant as legatee and distributee, therefore the judgment of that court is final and conclusive as between them and the sureties on her bond, unless reversed or set aside for fraud or mistake. If the executrix, prior to said final settlement in said County Court, held notes of appellant which he ought then to pay her, she ought to have then and there

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claimed a credit for the notes when she rendered her final account.

And further, the proceedings on final settlement in said County Court show, that upon her motion and request to that court, she obtained the order of that court that she pay appellant the sum of money sued for in this case; and that, upon paying it to him and presenting his receipt to said County Court, she be discharged as executrix, etc. Now, while it was true that said executrix undertook, in her said bond, that she would carry out the provisions of said will, yet she seems to have lost sight of its provisions as to investing appellant's share of said estate in real estate in Montgomery county, Illinois, when making her final settlement of said estate; and it may be because, from conversations with her brother Jacob, she understood then that he had elected to take his distributive share in money, instead of having her invest it in such real estate as the said will directed.

However, since it is contended that a conversation had occurred between appellant, through his attorney, and said executrix at said final settlement that might work an estoppel *in pais* against appellant objecting to having said notes deducted from his distributive share of said estate, as found in said settlement, we will say that no proper pleading was filed by the appellants in the court below to warrant that court in hearing evidence of such, or permitting such deduction. It may be that upon proper pleadings and proofs such contention may be established. It is also contended by appellees that in case this court should be of the opinion that under the provisions of his father's will, appellant has a right to elect to take, in money, his share of his father's estate given him by his father's will, yet they contend, from the evidence in this record, appellee Amanda E. Lease had no notice of such election, before she had taken such steps in purchasing real estate as provided by said will; that a court of justice would not permit appellant to elect to take the money and not the land at the time he did so elect.

The full answer to that contention is that the record

shows that appellees filed no proper pleading in the court below to warrant the court below to so adjudicate. It is a fundamental principle in our court procedure in this State that there must be in our courts of record both "*allegata et probata*" to sustain a judgment.

For the errors indicated above, we reverse the judgment of the Circuit Court of Montgomery County in this case, and remand this case to that court for a new trial.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1897.

Chicago & Alton R. R. Co. v. Gee Grimes.

1. **RAILROADS**—*Can not Contract Against Gross Negligence.*—A railroad company can not relieve itself by contract, from liability for damages resulting from its gross negligence.

2. **SAME**—*Waiver of Written Notice of a Claim.*—A railroad company may waive a provision in a shipping contract, that claims for damages must be made in writing, by receiving a verbal notice without objection and treating the claim as pending.

3. **PRACTICE**—*Statement of Objections on the Ground of Variance.*—In a suit against a carrier for damage to property it is not necessary to state where the property was received or discharged, it is sufficient if the relationship between the carrier and the owner of the property be stated and proved; and an objection that there was a variance between the averments and proofs, as to where property was received, should be so stated in the trial court, that the plaintiff may know of it and have an opportunity to amend his declaration.

4. **REMITTITURS**—*Allowed as a Matter of Course.*—Remittiturs are allowed as a matter of course when offered voluntarily, and this court does not think the trial court erred in allowing appellee to remit one dollar from his judgment.

Trespass on the Case, against a common carrier for damage to freight. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896. Rehearing allowed and case reheard at the May term, 1897. Affirmed. Opinion on rehearing filed September 20, 1897.

GEORGE S. HOUSE, attorney for appellant.

E. MEERS, attorney for appellee.

A carrier may waive a provision in a shipping contract, that a claim for damage must be made in writing in five days, and be verified by affidavit, by receiving without objection, unsworn notice, and treating the claim as pending for adjustment upon its merits. *Wabash R. R. Co. v. Brown*, 152 Ill. 484.

A common carrier can not by express contract exempt itself from liability resulting from gross negligence, or willful misconduct committed by itself, or its servants or employees; nor can it limit its liability in amount, as against damages resulting from such negligence. *Chicago & N. W. Ry. Co. v. Chapman*, 133 Ill. 96; *Wabash, St. L. & P. Ry. Co. v. Black*, 11 Ill. App. 465; *Chicago & N. W. Ry. v. Chapman*, 30 Ill. App. 504.

An immaterial variance will not be fatal. *Kidder v. Vandersloot*, 114 Ill. 135.

General objection of variance between declaration and proof is not enough; it must be specific to show wherein it consists. *Start v. Moran*, 27 Ill. App. 119.

It is too late to object to a variance between the pleadings and proofs on appeal. *Horne v. Walton*, 117 Ill. 130; *Schoonmaker v. Doolittle*, 118 Ill. 605; *Dulin v. Prince*, 124 Ill. 76; *Wabash, etc., Ry. Co. v. Coble*, 118 Ill. 115.

Such variance is no ground for reversal. *City of Mattoon v. Fallin*, 118 Ill. 249.

The objection of variance between allegation and proof is technical and not favored. *Stearns v. Reidy*, 135 Ill. 123.

OPINION PER CURIAM ON REHEARING.

We have considered the case upon the rehearing granted after the original opinion was filed and find no reason for changing the conclusion reached by the court at that time. The original opinion of the court, with a slight change of expression in one particular will be adhered to, and the judgment of the Circuit Court will be affirmed.

DIBELL, J., took no part.

OPINION OF THE COURT, BY MR. JUSTICE LACEY, AS MODIFIED ON REHEARING.

This was an action in case by appellee against the appellant to recover damages to a pacing mare known as Amy L., the property of appellee, by alleged negligence in switching the car on which the mare was being transported to Joliet, at appellant's railroad yards at that place, by means of which the car was struck by another car and jammed in such a manner as to throw the mare down and against the car in such a way as to permanently injure and ruin her.

The case was tried by a jury and resulted in a verdict in favor of appellee for \$1,000 and the latter then remitted one dollar of the verdict, and motion for new trial moved by appellant was overruled and judgment rendered against appellant on the verdict for \$999 and costs of suit. From this judgment this appeal is taken and a reversal sought on various grounds, the chief of which is that the verdict is manifestly against the weight of the evidence.

It appears from the evidence that the mare in question was shipped in a car containing three other horses, the property of one Harlan, and all in his name, from Paris, Illinois, to Joliet, Illinois, under a contract of shipment with the Terre Haute & Indianapolis Railroad Company, dated the 28th day of July, 1894. The contract provided that the stock transported in the car, No. 8566, was received on behalf of the company and of the connecting carriers to the place of destination.

The route taken was by way of Atlanta and Bloomington, and the car was received by the appellant as a connecting carrier on its line of road at Atlanta, Logan county, Illinois, or Bloomington, Illinois, and from there transported by the way of Bloomington to Joliet reaching there in the evening of the 29th of July, 1894, some time between five and seven o'clock.

The horses were accompanied by one Murray, an employe of Harlan, who rode in the car to take care of Harlan's three horses, and Frank Elkins, an employe of appellee, who also rode in the car for the purpose of taking care of appellee's own horse.

The final destination of the horses was Ingall's Park or Race Track, situate on the line of the Michigan Central Railroad about three miles east from the Joliet yards of appellant. The tracks of appellant were connected with the tracks of the Michigan Central Railroad by switch-tracks meeting near the intersection of Washington and Michigan streets. The Michigan Central Railroad had a switch or spur-track leading from its main line or track directly into the park, and there terminated in a "dead end."

For switching cars to Ingall's Park the Michigan Central Railroad Company charged a switching fee of \$2.00.

The case was tried on three counts of the amended declaration. The declaration charges that the horse was in a car of appellant's to be carried from the city of Bloomington to the city of Joliet for hire, and that while the car was switched from the main line at Joliet, and standing in the appellant's yards at Joliet, appellant carelessly, improperly and negligently caused certain other cars, or car or switch engine, to collide suddenly and violently with and against the car in which the horse was being carried, by means of which the appellee's horse was thrown upon the side and floor of the car, and personal property in the car, and injured in the hips, legs and pelvis and permanently injured and rendered valueless.

The three counts were, in substance, the same.

There is no dispute between the parties that the horse in question when brought into the Joliet yards was without injury, and that the happenings which resulted in the injury occurred after the car was cut or switched out of the train at Joliet.

It also appears from the evidence that at about 7.15 o'clock P. M. of the same evening when the train arrived at Joliet, the appellants delivered the car containing the mare and the other horses to the Michigan Central Railroad Company on its receiving track, to be there transported to the race track.

There is no dispute, from the evidence, that the mare in question when delivered at Ingall's Park on the same even-

ing about nine o'clock or a little after was injured in the manner described in the declaration, and was so badly injured that she has been worthless ever since.

The main defense set up and insisted upon by the appellant at the trial was that the mare was not injured while on the yard tracks of the appellant, but must have been injured by the negligence of the servants of the Michigan Central Railroad Company after the car was delivered to that company.

The jury, after hearing the evidence, found the issues in favor of the appellee, and counsel for appellant very earnestly contends that such a verdict was manifestly against the weight of the evidence.

We have read very carefully the argument of counsel on both sides, as well as the evidence as it appears in the abstract, and have come to the conclusion that while it is a matter of considerable doubt whether the mare was injured on the appellant's track, or that of the Michigan Central, yet the evidence is not so lacking to sustain the verdict of the jury that this court should interfere. The jury had the witnesses all before them and had a better opportunity to judge of the weight to be given to their evidence than this court.

We think that one fact is well established, and that is that the mare was injured by a jarring of the car or some other car against it while it was on the track of either the one or the other of the railroads, and that the act of occasioning the injury was of a grossly negligent character, for such an act could not happen if the employes of the railroad company conducting the switching had been in the exercise of due care and caution.

The employes of the railroad company handling that car that night and doing the switching, each on the part of their respective companies, testify that the accident and injury to the mare and the car did not happen while it was in the control of the respective sets of employes, and each set of employes had about an equal opportunity of knowing the facts about which they testified. If they were to be

believed, the jury would have been compelled to find that the mare had not been injured at all, and that the car had not been struck or run into, but the fact still remains that the mare was injured, and that the injury could not have happened without the cause alleged.

In this state of the evidence, Elkins, who had the mare of appellee in charge, testified positively that the injury occurred while the car was on appellant's yard tracks by being run against by another car, or an engine of appellant, in a violent manner, throwing the mare down in the car and injuring her. He also testified that he knew when the transfer of the car to the Michigan Central receiving track was accomplished, and while he may have been mistaken as to the time of day when the car arrived and the transfer made, and as to what particular track of appellant in its yards the car was switched onto, yet we think the jury was warranted in believing his evidence as to where the injury occurred and his statement as to the succession of events occurring after arriving in Joliet. He was, to some extent, also corroborated by the testimony of car inspector Parks, of the Michigan Railroad Company, who testified that he was present when the car in question was transferred to the Michigan Central road, and that the car had an apparently recent break on it, and that he inspected it there and then. Such break and the evidence in general, indicated very rough handling as though the car might have been run into or violently jammed by other cars, and there was no evidence tending to show that the car was in any way injured when it arrived at Joliet.

We are inclined to think, all the evidence considered, that it is sufficient to support the verdict.

A railroad company can not contract against its own acts of gross negligence, and, therefore, the contract of shipment, even if otherwise valid, could not restrict the recovery for the loss of the mare to \$100 or any other sum.

The Supreme Court of the United States holds that a common carrier can not contract to be freed from the consequence of its own negligence, even the want of ordinary

care, and we are unable to perceive any substantial grounds of distinction between the rights to contract to be relieved of the consequences of the carrier's negligence, either ordinary or gross, and while the Supreme Court of this State has holden that a common carrier may not contract to be relieved of the consequences of gross negligence yet we are not aware of any decision where it is holden that they may contract to relieve themselves of the consequences of damages caused by the want of ordinary care, or, in other words, "ordinary negligence," if such an expression has any legitimate meaning.

At all events, in this case, if the damage occurred in the manner testified to by Elkins, it was a case of gross negligence. *Wabash Railway Company v. Brown*, 152 Ill. 484.

We think that the claim for damages, though not in writing according to the shipping contract, was waived by appellant's receiving notice in time and making no objection to its form and treating it as pending. *Wabash R. Co. v. Brown*, *supra*.

It is objected by the appellant that there was a variance between the averments of the declaration and the proof, in that the declaration averred that the mare in question was received by the appellant at Bloomington, Ill., when the evidence tended to show that she was received at Paris, Ill., by the Terra Haute Railroad Company, from which appellant received her at Atlanta, Ill.

We think if the question has any force under the circumstances of this case the point was waived by appellant by saying, when the contract was introduced in evidence, it had no objection to it, and no motion was ever made to exclude the evidence, and appellee had no notice in the trial court that such a point was being raised and, so far as the record shows, the refused instructions aiming to raise the question were never brought to appellee's notice. It would be in the nature of a fraud on appellee to allow the question to be raised in this court for the first time. The points raised on the question of variance are of a highly technical character, and the *termini* between the two carrying points were not necessary to be stated. It was sufficient to state and show

the relationship between the carrier and owner of the property, that is, that the appellant had possession of the mare as a common carrier for hire, and if such a point is raised in the court below it should be so stated and raised that the opposite party may hear and know of it and have an opportunity to amend his declaration, if necessary.

The record fails to show that appellee had such opportunity.

We do not desire to be understood that there was any variance between the proof and declaration in this case. The appellant's instructions, in reference to the evidence in the case as to the value of the horse for special and unusual purposes, as to having a special value for racing, were given as asked by appellant and, from the evidence, the jury could not have allowed for the value of the mare as a racer. It was shown that the mare was worth the amount of the verdict for other purposes, as, for a roadster and driver.

We do not think the verdict was contrary to the evidence on the question of value.

We do not think that the court erred in allowing appellee to remit one dollar.

There was certainly no injury to the appellant.

Remittiturs are allowed as a matter of course when offered voluntarily, and often in furtherance of justice are recognized by the court.

There being no error in the record, the judgment of the court below is affirmed.

Peleg Cross v. Will County National Bank.

1. APPELLATE COURT PRACTICE.—*When the Court is Evenly Divided.*—When only two of the judges of this court take part in the consideration of a case and are divided in opinion as to whether the judgment should be affirmed or reversed, it must be affirmed.

Receivership Proceedings.—Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

Newell v. Reynolds.

GEORGE S. HOUSE, attorney for appellant.

EGBERT PHELPS, attorney for appellee.

OPINION PER CURIAM.

In this case Judge Dibell, having tried the cause in the court below, takes no part in its consideration here.

Judges Crabtree and Wright, being divided in opinion as to whether the judgment should be affirmed or reversed, the court is divided, and therefore the judgment is affirmed.

Amos J. Newell v. Polly S. Reynolds.

1. APPELLATE COURT PRACTICE—*Appellees Must File Briefs.*—The court does not feel disposed to investigate and pass upon the question of law presented in this case, in absence of a brief for appellee, and therefore reverses the judgment and remands the cause for another trial under the provisions of Rule 27.

Assumpsit, for medical services. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellant.

No appearance for appellee.

OPINION PER CURIAM.

This was a suit brought by appellant to recover for services rendered by him as a physician for the daughter of appellee. On trial before a jury in the Circuit Court, defendant had a verdict and judgment, from which plaintiff prosecutes this appeal. The bill of exceptions does not contain the evidence but recites what the evidence on each side tended to prove, and then sets out the instructions and

the motion for a new trial, and the rulings of the court to which the plaintiff excepted. The only question presented for our consideration is, whether the giving of a certain instruction for defendant was reversible error. Appellee has filed no briefs in support of the rulings and judgment below in her favor. Rule 27 of this court provides that in such cases the judgment shall be reversed *pro forma* unless the court, on examination of the record, shall deem it proper to decide the case upon its merits. We can not decide this case upon the merits in the absence of the evidence, and we are not disposed to investigate and pass upon the question of law presented in the absence of a brief by appellee. Therefore the judgment will be reversed *pro forma* and the cause remanded for another trial. Reversed and remanded.

Michael Manning v. Ludica Jarnagan.

1. APPELLATE COURT PRACTICE—*Appellees Must File Briefs.*—No brief having been filed by appellees, the court declines to make an investigation of the merits of the case without assistance, and reverses the judgment *pro forma* and remands the cause for another trial, pursuant to the provisions of Rule 27.

Trespass on the Case, for injuries to means of support caused by the sale of intoxicating liquors. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

F. J. QUINN, attorney for appellant; M. R. HARRIS, of counsel.

No appearance for appellee.

OPINION PER CURIAM.

This was a suit by the minor children of Wm. H. Jarnagan, by their mother as their next friend, against appellant

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for injury to their means of support alleged to have been caused by said appellant selling and giving said Wm. H. Jarnagan intoxicating liquors, thereby causing his habitual intoxication. Upon trial, plaintiffs recovered verdict and judgment for one hundred dollars, from which defendant appeals. The record is large and the questions of law and fact, raised and argued by appellant upon the evidence and instructions, are numerous. No brief has been filed in behalf of appellees, and we do not feel called upon to make an investigation of the merits of the case without their assistance, but the judgment will be reversed *pro forma* and the cause remanded for another trial, pursuant to the provisions of Rule 27 of this court. Reversed and remanded.

M. L. Barrett v. C. A. Bogardus.

1. **ESTOPPEL**.—*Statements in a Debtor's Schedule*.—A, having secured a judgment against B, caused an execution to be issued and levied upon a piano in B's possession. B thereupon made a schedule under the exemption law, including, among other property, "one piano, title in Aurora Piano Co." The piano company having been defeated in a replevin suit against the officer, B claimed the piano, and on a trial of the right of property it was held that his statement in the schedule as to the title to the property did not operate to estop him from setting up any claim he might have.

Trial of the Right of Property.—Appeal from the County Court of Kane County; the Hon. MARCUS O. SOUTHWORTH, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

STATEMENT OF THE CASE.

On July 11, 1894, appellant recovered judgment against appellee for \$202.49 by confession in the Circuit Court of Kane County. An alias execution was issued thereon October 25, 1895, and placed in the hands of the sheriff of said county, who levied the same upon one piano of the Aurora Piano Co. manufacture, which is the property in controversy in this suit.

On October 30, 1895, appellee made his schedule under the exemption law, and delivered the same to F. H. Holz, deputy sheriff, who then had the execution. Among other personal property included in the schedule was the following, viz: "One piano, title in Aurora Piano Co." Without paying any attention to the schedule, the sheriff on November 2, 1895, placed a custodian in charge of the piano, and the Aurora Piano Co. on the same day replevied and took the same from the possession of the sheriff. On a trial of the replevin suit in the City Court of Aurora, the piano company was defeated, and the piano was returned to the possession of the sheriff. Appellee then claimed the property in the piano, and served a notice upon the sheriff, in pursuance of the statute, to try the right of property. This notice was returned into the County Court, where a jury was waived, and a trial of the right of property had before the court, resulting in a judgment in favor of appellee, from which Barrett appeals to this court.

It appears that appellee had purchased the piano in question from the Aurora Piano Manufacturing Company some time in 1892, the purchase price being \$350, upon which he paid \$150 in cash, and gave his note for the balance. Long before the date of appellant's judgment the piano company had been pressing appellee for payment upon this note, and some time in 1895, it was agreed between Harry Sadler, business manager of the piano company, and appellee, that the latter should return the piano to the company and the company should surrender up the note to him. But it turned out afterward that the company was not the owner of the note at the time of this agreement, so that it could not surrender the same to appellee, and nothing further was ever done under the agreement; appellee retained the possession of the piano, and his note still remained outstanding. This was the situation at the time of the levy and the making of the schedule.

NICHOLS & SEARS, attorneys for appellant.

LITTLE & AVERY, attorneys for appellee.

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It is essential to an estoppel by conduct that there be a fraudulent purpose and a fraudulent result, the element of fraud is indispensable. *Knapp v. Jones*, 143 Ill. 375; *Boynton v. Holcomb*, 49 Ill. App. 503.

Again: There must be deception and a change of conduct in consequence. *Mullanphy Bank v. Schott*, 34 Ill. App. 500; *Boynton v. Holcomb*, 49 Ill. App. 503.

Again: There must be misrepresentation or concealment of material facts and reliance on the same with prejudice. *Boynton v. Holcomb*, 49 Ill. App. 503.

There is no estoppel where the parties are equal in knowledge of the matter, and the party acting acts wholly on his own judgment. *Knapp v. Jones*, 143 Ill. 375; *Mullanphy v. Schott*, 34 Ill. App. 500.

An estoppel, such as is here attempted to be set up, is odious and must be strictly made out.

The party setting it up must show that there was a willful intent to make him act on the faith of the representations and that he did so act. *Keith v. Lynch*, 19 Ill. App. 574.

Again an estoppel never takes place where one party did not intend to mislead and the other party is not actually misled. *Brown v. Bowen*, 30 N. Y. 541; *Jewett v. Miller*, 10 N. Y. 406.

And again the representation must be credited as true and the thing of value be parted with, the credit be given, or the liability incurred in consequence thereof. *Jones v. McPhillips*, 82 Ala. 116.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

The main contention of appellant is, that because appellee noted upon his schedule that the title to the piano was in the Aurora Piano Co. he is now estopped from claiming it as his property. It is not denied that the schedule was in exact compliance with the law, otherwise than this notation of ownership in the piano company. But even though that memorandum was made, appellee distinctly stated that he desired to avail himself of the benefit of the exemption law, and that he claimed all the property listed in the schedule

as exempt under the law. He was mistaken as to the title being in the piano company, as was developed in the trial of the replevin suit, but we think so far as he had any interest, he was entitled to have the benefit of the exemption law. It was the clear duty of the sheriff to summon three householders to "appraise the property * * *" and fix the "fair valuation on each article contained in the schedule," as provided by statute, and failing to do this, he had no right to the property under his levy. The doctrine of estoppel has no application so far as appellee is concerned. There seems to have been no element of fraud. He did not seek by his schedule to deceive any one. Had he made no mention of the rights of the piano company in view of the agreement with it, he would have been doing quite right so long as he and the company mistakenly supposed that such agreement transferred the title of the property to the company. But even had that agreement been carried out, he still had an equity in the piano which was to be recognized in case he became able to redeem.

It would seem that if the doctrine of estoppel applies anywhere in the case, it would be against appellant. He caused the piano to be levied upon as the property of appellee. He resisted the replevin suit on the ground that the piano was appellee's property, and subject to levy under the execution. Having succeeded in that suit, he now claims that appellee has no right to the benefit of the exemption law under his schedule, because he mistakenly stated the title to be in the piano company. Appellant ought not to be permitted now to take that position. We think the judgment is just, and finding no error in the rulings of the court, it will be affirmed.

71	410
38	614

**Charles Schneider and Edwin Rice, Ex'rs, v.
Alvin C. Foote.**

1. **LIMITATIONS**—*Filing Claim in County Court as Commencement of Suit.*—The decision in *Reitzell v. Miller*, 25 Ill. 67, that: "The filing of a claim in the Probate Court, if it may be regarded as the commence-

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ment of a suit so as to prevent the running of the statute of limitations, must be at the time fixed by the administrator for filing claims for adjustment, and must be followed by an adjudication at that term, or be regularly continued from term to term until it is passed upon by the court, and if it is not so acted upon or continued, a discontinuance takes place and the case is no longer in court," is still the law of this State and must govern the present case.

Claim in Probate.—Appeal from the Circuit Court of Ogle County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

F. E. REED and H. A. SMITH, attorneys for appellants.

BACON & EMERSON, attorneys for appellee.

The filing of a claim against an executor has the effect of a pending suit, and the rights of the creditors should be determined as of the date of the filing of the same, and are not prejudiced by any delay in adjudicating it. In re Hilborn's Est., 5 Pa. Dist. Ct. 265.

The simple filing of the claim ought to be considered as the commencement of a suit as in an ordinary suit at law, and should prevent the further running of the statute of limitations. Horner's Probate Law (Ed. 1881), Sec. 198.

In Maryland, it has been held in a parallel case of administration, that a claim against an insolvent estate, if not barred by the statute of limitations at the time of filing, is not afterward affected by lapse of time in adjudicating the same. Matter of Leiman, 32 Md. 225; Hignutt v. Garey, 62 Md. 190.

"The administrator gives jurisdiction of his person by publishing a notice for the presentation of claims." Ward v. Durham, 134 Ill. 195.

The Probate Court of Ogle County acquired jurisdiction of the claim of appellee when it was filed and docketed, November 17, 1891, the appellants having previously fixed upon the July term, 1890, for claim term. The claim remained upon the docket and the court never lost its jurisdiction.

There is no allegation that the claim, was not regularly continued from term to term after it was filed, and it must therefore be presumed that it was continued. *Ward v. Durham*, 134 Ill. 195.

The neglect of the clerk to keep a claim once filed, upon the docket, or the absence of any special order of continuance from term to term, until final adjudication, will not bar recovery on a claim properly presented. *Barbero v. Thurman, Adm'r*, 49 Ill. 283.

In *Freeman et al. v. Freeman*, 65 Ill. 106, the court expressly says, in fixing the period covered by the statute of limitations, specially pleaded in that case, that the statute barred all services rendered more than five years prior to the presentation of the claim.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This cause arose in the County Court of Ogle County, upon the filing by appellee of a claim against the estate of John Eyster, deceased, for taking care of the latter during his last illness. The claim was allowed by the County Court, and upon appeal by the executors to the Circuit Court there was a trial *de novo* by a jury, resulting in a verdict in favor of appellee for \$66.50. A motion for new trial being overruled there was judgment on the verdict.

It appears from the evidence that said John Eyster departed this life April 16, 1890, leaving a last will and testament, which was duly admitted to probate in the County Court of said Ogle County, and on April 29, 1890, the appellants, Charles Schneider and Edwin Rice, were duly appointed executors, qualified and are still acting as such. The July term 1890 of said County Court was fixed upon by the executors as a time for the presentation and adjustment of claims against the estate of the testator, and the proper notices were given as required by law.

Appellee filed his claim against the estate November 17, 1891, being a period of some sixteen months after the time fixed upon by the executors for the presentation of claims.

Schneider v. Foote.

It does not appear from the record that any notice of the filing of the claim was given to the executors, nor that any summons was issued or served upon them, nor was anything whatever done towards prosecuting the claim until January 26, 1897, when the executors appeared in court and resisted the allowance of the claim, setting up the defenses of payment and the statute of limitations.

We think this case must be governed by the decision in *Reitzell v. Miller*, 25 Ill. 53, wherein it was held, that even if the filing of a claim in the Probate Court may be considered as the commencement of a suit, so as to prevent the running of the statute of limitations, yet, to have such effect, it must be filed at the time fixed by the administrators for filing claims for adjustment. And it must be followed by an adjustment at that term, or be regularly continued from term to term until it is passed upon by the court. And if it is not so acted upon or continued, a discontinuance takes place and the cause is no longer in that court.

To break the force of this decision, counsel for appellee contend that it was rendered under the statute of 1845, which they claim was different from the one now in force. We find no substantial difference between the two statutes. We think the case referred to was decided upon correct principles, and we find nothing in the later decisions which overrules it or weakens its force. No reason is perceived why the mere filing of a claim, sixteen months after the term fixed upon by the executors, without notice to them or service of process upon them, followed by more than five years of absolute inaction thereafter, should be held to suspend the running of the statute of limitations. Parties ought to be held to some sort of diligence in prosecuting their claims against the estates of deceased persons, and if, by letting them remain quiescent for many years, as was done in this case, they are lost, the cause is attributable to their own *laches*.

It is stated in argument of counsel for appellee, that the executors had notice of the filing of the claim, and had on a prior occasion joined in the taking of a deposition, to be

used on the trial of the cause. When this was, is not stated, nor can any weight be given to the statement because the record is silent as to any such matter having occurred.

Our conclusion is that the claim was barred by the five year statute of limitations, and the court erred in not so instructing the jury. The judgment will be reversed and the cause remanded.

We forbear to comment on the weight to be given to the receipts offered in evidence, as the cause must be submitted to another jury under proper instructions. Reversed and remanded.

Chicago & Alton R. R. Co. v. Fred Goltz.

1. **RAILROADS—An Injury to a Servant Held to Have Resulted from a Risk Incident to the Business.**—In a suit against a railroad by a member of a section gang for injuries occasioned by the alleged negligence of the company, the court finds as a matter of fact that plaintiff was injured as a result of one of the risks ordinarily incident to the business in which he was engaged, and without fault or negligence on the part of the railroad company or its servants.

2. **FELLOW-SERVANTS—Foreman and Members of a Section Gang of a Railroad.**—The members of a section gang of a railroad and their foreman are fellow-servants within the rule exempting the common master from liability for injuries to one in consequence of negligence on the part of the other.

3. **DAMAGES—\$5,000 Held Excessive.**—In a suit against a railroad by a member of a section gang for an injury resulting in a serious shortening and stiffening of the right limb, very materially interfering with, if not preventing entirely, the performance of manual labor, the court thinks an allowance of \$5,000 damages is excessive.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Reversed with finding of facts. Opinion filed September 20, 1897.

GEORGE S. HOUSE, attorney for appellant.

It has become well settled that the master may conduct his business or any particular branch of his business in his

own way, although another method be less hazardous; and the servant takes the risk of the more hazardous method if he know the dangers attending the business in the manner in which it is carried on. Hence, if the servant, knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he can not maintain an action against his employer because he may be able to show there was a safer mode in which the business might have been carried on, and that had it been carried on and conducted in such manner, he would not have been injured. *Naylor v. Chicago & N. W. Ry. Co.*, 53 Wis. 661; *Stephenson v. Duncan*, 73 Wis. 406.

When a servant consents to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by reasonable expense, have been made safe. *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Green v. Cross*, 79 Tex. 180; *O'Neal v. Chicago and I. C. Ry. Co.*, 132 Ind. 110; *Chicago, B. & Q. R. Co. v. Merckes*, 36 Ill. App. 195; *United S. Rolling Stock Co. v. Chadwick*, 35 Ill. App. 474; *Weigreffe v. Daw*, 40 Ill. App. 53.

E. MEERS and J. W. DOWNEY, attorneys for appellee.

A master is liable to a servant when he orders the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur it. Even if the servant has some knowledge of the attendant danger, his right of recovery will not be defeated if, in obeying the order, he acts with a degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work, the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils; the servant has the right to rest upon the assurance that there is no danger which is implied by such an order. The master and servant are not altogether upon a footing of equality. The primary duty of

the latter is obedience, and he can not be charged with negligence in obeying an order of the master, unless he acts recklessly in so obeying. Whether he acts thus recklessly, or whether he acts as a reasonably prudent person should act, are questions of fact to be determined by the jury. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 460; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573; *Keegan v. Kavanaugh*, 62 Mo. 230; *Ferren v. Old Colony R. R. Co.*, 143 Mass. 197; *Lee v. Woolsey*, 109 Pa. St. 124; *Kranz v. Long Island Ry. Co.*, 123 N. Y. 1.

The master is liable for an injury to a servant resulting from the orders of a superintendent, or other employe or agent having the supervision of the work, and power to employ, direct and discharge the laborers. *Lalor v. Chicago, Burlington & Q. R. R. Co.*, 52 Ill. 401; *Gormly v. Vulcan Iron Works*, 61 Mo. 492.

Negligence by a representative of the master, arising in the form of improper orders and directions given about the work, and in the control of operatives, will render the masters liable. *Chicago, B. & Q. R. R. Co. v. McLallen*, 84 Ill. 116; *Dowling v. Allen*, 74 Mo. 13; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Thompson on Negligence*, 975, 1028 and 1031; *Cooley on Torts*, 562.

The question whether servants are in the same line of employment is properly left to the jury. *Toledo, W. & W Ry. Co. v. Moore, Adm'x*, 77 Ill. 217.

An employe of a railway company having the charge and control of a crew or gang of men engaged in any particular service, who are bound to obey his orders, is not a fellow-servant with such persons, in the same line of employment, within the meaning of the rule that prevents a recovery by a servant of his master, for the negligence of a fellow-servant, and the commands of such employe, within the scope of his authority, are to be regarded as those of the master. *Wabash, St. L. & P. Ry. Co. v. Hawk*, 121 Ill. 259.

When a railway company confers authority upon one of its employes to take charge and control of a gang of men in car-

rying on some particular branch of its business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company. * * * In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, those under his charge are bound to obey, at the peril of losing their situation, and such commands are, in contemplation of law, the commands of the company, and hence, it is held responsible for the consequences. These views are in strict accord with all that is said in the *Moranda* case. * * * The governing servant is not the fellow-servant of those under his charge with respect to the exercise of such powers. *Chicago & A. R. R. Co. v. May*, Adm'x, 108 Ill. 288.

The amount of damages to be awarded in actions to recover for personal injuries, caused by another's negligence, is a matter peculiarly within the province of the jury. *Town of Wheaton v. Hadley*, 30 Ill. App. 564.

There is no fixed standard by which damages can be measured in such cases. And when a jury, without passion or prejudice, have defined the amount, it should not be disturbed, unless so high as to strike a court at first blush as unreasonable. *Chicago & A. R. R. Co. v. Kelly*, 28 Ill. App. 655.

Recovery is for pain and anguish suffered and to be suffered, all damages to person, apparent or otherwise, loss of time, reasonable expenses in being cured, and generally all damages alleged in the declaration, and believed from the evidence to be sustained. *Village of Sheridan v. Hibbard*, 119 Ill. 307; *Hannibal & St. J. R. R. Co. v. Martin*, 111 Id. 232.

In assessing damages, all the facts, etc., in evidence should be considered; the nature and extent of the injuries; pain and suffering resulting; permanent injury caused, if any;

expense of healing or curing; future pain and suffering, or inability to labor, etc. *Fisher v. Jansen*, 128 Ill. 551.

A verdict of \$6,565 for injuries, permanently and completely disabling and leaving in a condition of suffering, a woman forty-four years of age, who previously did all her house work, is not excessive. *Miller v. Boone County*, 63 N. W. (Iowa) 352.

A man aged fifty-four years was negligently hurt so that he was confined to his house for six weeks, had three ribs broken and was lamed probably for life—\$5,000 held not to be excessive. *Quinn v. Long Island R. R. Co.*, 34 Hun (N. Y.) 331.

Injuries to a servant through obedience to the order of his superior, producing total blindness. Damages \$9,000; not excessive. *Stearns v. Reidy*, 33 Ill. App. 246.

Conductor of a mixed passenger and freight train and acting brakeman; age forty-five years; injuries, foot crushed, resulting in amputation; other permanent injuries. Damages \$14,000; not excessive. *Joliet N. & A. Ry. Co. v. Velie*, 36 Ill. App. 453.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover damages for injuries incurred by appellee, while in the employment of appellant as a section hand in a gang of section men, of which one James Buckley was foreman.

The case was tried by a jury, who returned a verdict in favor of appellee for \$7,000. The court required a remittitur of \$2,000, which, being entered, a motion for a new trial was overruled and judgment entered in favor of appellee for \$5,000.

At the time of the accident which caused appellee's injury, he had been working for appellant as a member of this section gang, under charge of the foreman Buckley, for about three weeks. He had previously worked in a similar capacity on the C., R. I. & P. R. R. for one summer, and had also been engaged, on a former occasion, in like employment

with appellant, for a period of about two months. It appears, therefore, that when appellee applied to Buckley for employment, some three weeks before his injury, and was then engaged, he was not unfamiliar with the nature of the service, the duties that would be required of him, or the risks naturally and necessarily incident to the business he was entering upon.

The section upon which he was employed under charge of Buckley, extended south from Fifth avenue, in the city of Joliet, for about seven miles, along that portion of appellant's railroad known as the "Coal City Branch." It was the duty of the foreman and his gang to go over this section each day, to see that the track was kept in proper repair, and this was accomplished by means of a hand-car propelled by the men of the gang, under Buckley's direction, he going out with them in the morning and staying with them all day while at their work. In passing over the road it was the duty of all the members of the gang to maintain a sharp lookout for trains and keep the hand-car out of the way, so that neither such trains nor themselves should be endangered by a collision. If a train was seen approaching, the men set the hand-car off the track until the train had passed by, then set their hand-car back upon the track and proceeded upon their way. Running upon appellant's railroad at the time of the accident was a fast train, known as the "Chicago and Kansas City Limited," but familiarly called by the men "The Hummer," and which was a regular passenger train running every day upon schedule time, arriving at Joliet at 8:15 A. M.

Leaving Joliet upon their hand-car about seven o'clock in the morning, the section men usually met this train at "Judge's Cut," unless they had work to do between that point and Joliet, when they might meet it at any place on the road where they happened to be. In the vicinity of Judge's Cut, the Atchison, Topeka & Santa Fe Railroad runs near to, and parallel with, the railroad tracks of appellant. On the morning of the accident, June 25, 1895, the members of this section gang met at about seven o'clock, got out their

hand-car and proceeded to their work, running southerly along the track, keeping a lookout for the "Hummer," all facing in the direction in which they were going while working the levers to run the car, until Judge's Cut was reached, when the hand-car was stopped and all listened for the train, but not hearing it and finding it to be overdue, the foreman remarked that the train was late. One of the men, Derrig, said: "We could make the next siding before the train comes;" and another said, "Oh, I guess we can make the next set off." All this was said in the hearing of appellee, and apparently without any particular orders to do so, the men commenced working the levers again and moving the car forward, but they had not proceeded very far when a train was seen approaching. For a moment there seems to have been a discussion among the men, as to whether the on-coming train was upon the Santa Fe tracks or upon the one on which the gang were traveling with the hand-car, but as soon as it was discovered that it was on the last named track, the foreman gave orders to get the hand-car off the track. Several of the men swear they did not hear the order, but every member of the gang, including the foreman, at once seized hold of the hand-car and endeavored to remove it from the track and out of the way of the approaching train. In this they were unsuccessful, and seeing that the train was close upon them and that they were in great danger, the foreman called out to the men to get out of the way. This they all did in safety except appellee, who was struck in some manner by a tool or portion of the hand-car thrown therefrom when the train collided with it. Just how the injury occurred does not clearly appear, but after the train had passed by, appellee was found lying on the bank of the roadway, fifteen or twenty feet from the east rail of the track with his leg broken. He was removed to a hospital, but the result of the injury is a serious shortening and stiffening of the right limb, very materially interfering with, if not preventing entirely, his performance of manual labor.

Unfortunate as this result is to appellee, we think, upon

the facts appearing in the record, he has not established a cause of action against appellant. We fail to find in the evidence any proof of negligence on the part of the section foreman, or any evidence that under the circumstances of the case he gave any improper order. As the result proved it would have been safer for the foreman to have kept his hand car and gang of hands in Judge's Cut for a few minutes longer, and until the train had passed, but he could not foresee the consequences, and was only bound, under the circumstances, to exercise that degree of care and prudence, which ordinarily careful and prudent men would be expected to use under like surroundings. Who can say that an ordinarily careful and prudent section foreman, failing to meet a train at the place where he had a right to expect it, and finding it behind time, would not have done as this man did, and proceed on his way carefully and cautiously, looking out for the train, as the evidence shows they did do, and as soon as it came in sight try to get the hand car out of the way? Common observation has taught us all that when a train is once behind time, it is the merest guess work as to when it will come, except that at the stations some message may be received as to how much it is behind time. This section foreman had no means of knowing whether the train would come in five minutes or half an hour. The question of getting to the next turn out, was a matter of discussion among the men, and the general opinion seemed to be that they could do so safely. The result showed they were mistaken, but it does not necessarily prove they were careless or reckless in endeavoring to do so. No doubt their experience had shown them that they could do with safety what they attempted to do on this occasion and failed in accomplishing; but they had done similar things many times before and supposed they could do so again without unusual risk. The very business in which these section men are engaged, passing daily over their portion of the road, with the liability always about them to encounter trains; the necessity of doing their work and performing their duty in spite of the trains, shows that they

are unavoidably placed in positions of danger and peril, from which accidents frequently occur even under the most careful management. In this case we think the accident was a consequence of one of the risks ordinarily incident to appellee's employment. When he sought the employment he knew the manner in which the business was conducted and the risks he would encounter, and he must be presumed to have contracted in reference thereto. We do not think appellee's injury was attributable to any improper order given by the section foreman. Even if it were conceded that he gave the order to go forward after stopping in Judge's Cut to listen for the train, we can not say it was negligence on his part to do so, because we can not see that any ordinarily prudent person under like circumstances would not have done the same thing.

It certainly can not be said, that giving the order to get the hand-car off the track, when the train was discovered to be approaching, was an improper or negligent act. Had he made no effort to avoid a collision between the train load of human freight and the hand-car, he would certainly have been guilty of most culpable negligence. We fail to see what more, or less, any prudent man could have done under the same circumstances, than this foreman did to protect his men, or secure the safety of the passenger train. Our conclusion is, that the charge of negligence against appellant is not sustained by the evidence.

We are further of the opinion that in the business and enterprise in which appellee and the section foreman were engaged at the time of the accident, they were fellow-servants within the rule exempting the common master from liability for injuries to one, in consequence of negligence on the part of the other, and therefore that appellant was not liable in this case, even if the section foreman was negligent. We do not deem it necessary to go into an extended discussion of our reasons for this opinion, but content ourselves with simply expressing it.

We think that the damages were excessive even after the remittitur was entered, but as we are of the opinion that

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appellee has shown no right of recovery, we need not discuss that question further. At the close of all the evidence in the case, appellant asked an instruction directing the jury to find the defendant not guilty. This instruction the court refused to give, and in this we think the court erred, for the reasons we have already given.

It follows that the judgment must be reversed.

DIBELL, J., took no part.

FINDING OF FACTS TO BE MADE A PART OF THE JUDGMENT.

We find, as a question of fact, that the injury to appellee was not received in consequence of any negligence of appellant, nor of the section foreman, James Buckley. That in what he did and said in control of his gang and hand-car at the time of the accident and prior thereto from the time of leaving Judge's Cut, and in leaving the last named place, as shown by the evidence, the said James Buckley acted with due care and caution, and did not give any improper, careless or negligent orders.

We further find as a question of fact that appellee was injured as a result of one of the risks ordinarily incident to the business in which he was engaged, and without fault or negligence on the part of appellant or its representatives or servants.

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1. PRACTICE—*Objections on the Ground of Variance Should be Specific.*—A defendant, moving for a peremptory instruction without stating any specific ground for such motion, can not insist for the first time in a court of appeal, that there is a variance between the allegations and the proofs, as the variance should have been pointed out specifically in the trial court.

2. PLEADING—*Statement of Injuries.*—In a suit against a city for personal injuries, the declaration gave the defendant full notice that the plaintiff expected to prove an injury to her right leg in consequence of a fall on a defective sidewalk. *Held*, that evidence that varicose veins

resulted to the limb of the plaintiff in consequence of the fall, was admissible.

8. **DAMAGES**—*A Question for the Jury*.—In a suit for personal injuries the jury have better opportunities for ascertaining the extent of plaintiff's injury and determining the compensation he ought to receive than a court of appeal, and unless the court can see that they were influenced by passion or prejudice, it should not interfere. •

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

COLL McNAUGHTON, attorney for appellant.

E. MEERS and J. W. DOWNEY, attorneys for appellee.

A non-substantial variance will not be fatal. *Kidder v. Vandersloot*, 114 Ill. 135.

An objection to variance between allegations and proof should be made in the trial court to afford opportunity to amend. *Lake Shore & M. S. Ry. Co. v. Ward*, 135 Ill. 516; *Chicago, R. I. & P. Ry. Co. v. Clough*, 134 Ill. 594; *Wight F. P. Co. v. Poczekai*, 130 Ill. 143; *Hammond v. Goodale*, 38 Ill. App. 365; *McMahon v. Sankey*, 35 Ill. App. 341.

General objection of variance between declaration and proof is not enough; it must be specific to show wherein it consists. *Start v. Moran*, 27 Ill. App. 119; *Lake Shore & M. S. Ry. Co. v. Ward*, 135 Ill. 516; *McCormick H. M. Co. v. Burandt*, 37 Ill. App. 167.

Such defects are cured by verdict. *Chicago, R. I. & P. Ry. Co. v. Clough*, 134 Ill. 594; *McMahon v. Sankey*, 35 Ill. App. 341.

It is too late to object to a variance between pleadings and proofs on appeal. *Horne v. Walton*, 117 Ill. 130; *Schoonmaker v. Doolittle*, 118 Ill. 605; *Dulin v. Prince*, 124 Ill. 76; *Wabash, etc., Ry. Co. v. Coble*, 113 Ill. 117.

Such variance is no ground for reversal. *Mattoon v. Fallin*, 113 Ill. 249.

The objection of variance between allegations and proof is technical and not favored. *Stearns v. Reidy*, 135 Ill. 123.

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MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case, for the recovery of damages for injuries claimed to have been sustained by appellee, in consequence of a fall on a defective sidewalk, in the city of Joliet, on September 29, 1894. On a trial by jury appellee recovered a verdict for \$1,500. A motion for new trial was overruled and judgment rendered on the verdict.

It appears from the evidence that on the day of her injury, appellee and two lady friends were walking north on Collins street, in the city of Joliet, toward her home, when one of the planks of the wooden walk, over which they were passing, being stepped upon by one of the party, suddenly flew up in front of appellee's feet, tripping her up and causing her to fall with such violence as to produce the injuries complained of. Complaint is made that the court erred in admitting evidence as to matters not charged in the declaration, but we find no error was committed in that respect. At the close of plaintiff's testimony, a motion was made by appellant to direct a verdict in its favor. It is now insisted that there was such a variance between the declaration and proofs, that this motion was proper and should have been sustained.

We think the question of variance was not sufficiently raised in the court below to enable appellant to avail of the objection in this court. So far as the abstract shows, the motion was made generally, without any statement of variance being given as the ground of the motion. Had such a statement been made, the plaintiff could have amended her declaration so as to meet the objection, which we think comes too late when made for the first time in this court. *Probst Construction Co. v. Foley*, 166 Ill. 31.

It is also insisted by appellant that the court erred in admitting evidence that varicose veins resulted to the limb of the plaintiff, as a consequence of her fall and injury, because the declaration made no complaint as to any affection of the blood vessels, or enlargement of the injured member. It is true the declaration contains no allegation

as to these specific results of the injury, but yet the charges were broad enough we think to warrant the proof admitted. The object of pleading is to give the opposite party notice of what the pleader expects to prove. Here the declaration gave appellant full notice that the plaintiff expected to prove an injury to her right leg in consequence of a fall on the defective sidewalk. We do not perceive how the defendant could have been in any better position for defense, had the declaration further alleged that, as a result of such fall and injury, the plaintiff was now suffering from varicose veins. We think there was no error on the part of the court in admitting the evidence.

Complaint is also made that the court erred in giving, refusing and modifying instructions. We do not deem it necessary to discuss the instructions and the objections thereto in detail. We have carefully examined and considered them, and reached the conclusion that the court committed no serious error in instructing the jury. Those given on behalf of the plaintiff fairly stated the law of the case, and those asked by the defendant and refused were substantially embodied in other instructions given at its instance. We find no error in modifying instructions.

It is strongly urged that the damages are excessive. The jury saw the plaintiff and heard her testify, and they heard all the evidence in the case. They had better opportunities of ascertaining the amount of plaintiff's injury, and determining the compensation she ought to receive, than we have, and unless we can see that they were influenced by passion or prejudice, we ought not to interfere.

Appellee was a widow about forty-one years old at the time of her injury, supporting herself and several small children by washing and scrubbing.

If her testimony is reliable, she can not now stand upon her injured limb for any length of time, without suffering great pain, and can not do any scrubbing upon her knees, as she did before being injured. It was for the jury to determine whether these things were true or not. If they were, we can not say the damages are excessive.

The judgment will be affirmed.

Chicago, L. S. & E. Ry. Co. v. Christopher Hartmann.

1. EVIDENCE—*Of the Reputation of a Servant as Proof of Negligence.*—In a suit for personal injuries, in which it is charged that the master was guilty of negligence in employing and retaining a particular servant, evidence of the general reputation of the servant is competent.

2. NEGLIGENCE—*Finding in Regard to, Sustained.*—Whether a charge of negligence is sustained by the evidence is a question for the jury, and in this case the court thinks they were warranted in finding that the injury complained of resulted from a want of due care on the part of the defendant.

3. APPELLATE COURT PRACTICE—*Where the Sufficiency of the Evidence to Sustain Different Counts of a Declaration is Questioned.*—A court of appeal can not say under which count of a declaration a jury may have found their verdict, and where no improper evidence was admitted and one good count is proven, it is not necessary to decide whether the evidence was of a character to authorize a verdict under another count.

4. DAMAGES—*\$2,500 Held Proper in a Personal Injury Case.*—The question of damages was fairly submitted to the jury under proper instructions, and this court can not say that the judgment of \$2,500 was unreasonable or excessive.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County: the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

E. PARMALEE PRENTICE and GARNSEY & KNOX, attorneys for appellant.

Incompetency of a servant can not be shown by evidence of reputation alone. Actual evidence that the servant complained of is incompetent must be produced, and then evidence of his reputation is admissible to fasten upon the master knowledge of his incompetency. *Shearman & Redfield on Negligence*, Sec. 192; *Gier v. Los Angeles C. E. Ry. Co.*, 41 Pac. Rep. 22; *Baulec v. New York & H. R. R. Co.*, 59 N. Y. 356; *Davis v. Detroit & M. Ry. Co.*, 20 Mich. 105.

The evidence produced by the plaintiff does not show that Alexander's reputation was bad. It shows only some gossip

of four or five people. Gossip is not reputation. 1 Greenleaf on Evidence, Sec. 461; Rice on Evidence, 630; Jones on Evidence, Sec. 863; Am. & Eng. Ency. of Law, Vol. 3, 114.

The court erred in admitting the evidence of Kinney as to Alexander's reputation as an engineer, and also erred in refusing to strike out the testimony of this witness upon motion of defendant.

This is an error affecting the merits of the case. Reputation can only be testified to by one having knowledge of it, derived prior to the occurrence, "*ante motam litem*." Am. & Eng. Enc. of Law, Vol. 3, 116, Tit. "Character;" Douglass v. Tousey, 2 Wend. 352; Reid v. Reid, 17 N. J. Eq. 101; Wroe v. The State, 20 O. St. 460; Wharton Cr. L., 5th Ed.; Sec. 635, Griffith v. State, 90 Ala. 583; Carter v. Commonwealth, 2 Va. Cases 169; State v. Johnson, 1 Winston L. (N. C.), 238.

E. MEERS and J. W. DOWNEY, attorneys for appellee.

Evidence of the general reputation of Alexander, the engineer, as to his manner of running and operating the switch engine, is competent. Western Stone Co. v. Whalen, 151 Ill. 472; 2 Thompson on Neg. 153; Wood on Master and Servant, Sec. 420; Shearman and Redfield on Neg., Sec. 223.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover damages for injuries alleged to have been sustained by appellee, in consequence of the negligence of appellant. There was a trial by jury and verdict in favor of appellee for \$3,500. The court required a remittitur of \$1,000, which, being entered, a motion for new trial was overruled and judgment rendered for \$2,500. Appellant brings the case here by appeal.

The declaration contained three counts, the first charging, in substance, that appellant was negligent in failing to use due care to keep its track in proper and safe repair. The second charged negligence on the part of appellant in

employing, and retaining in its employment, the engineer, upon whose engine appellee was riding at the time he received the injury complained of; and the third count was a union of the other two.

Appellee was in the employment of appellant as a yard switchman, and had been in such employment for about a month before the accident, which occurred on October 6, 1894, at a point on the tracks of the Calumet & Blue Island Railway, a few hundred feet south of the inclosure forming the west mill yard of the Illinois Steel Company, in the city of Joliet. The business conducted at this point consisted in pushing loaded cars into the yards of the steel company, and in taking out such loaded and empty cars as it was desired to ship. At the point where the accident occurred there was what is termed a "three-throw switch;" that is, a switch where connection is made with three different tracks. This switch consisted of two rails, with switch-stand, bars, and connections for its proper operation. One of the three tracks connecting with this switch led up a steep incline to the top of some trestles, constituting what are designated in this case as the "tonnicas." The work which Hartman and the crew with which he was working at the time of his injury was engaged in, was pushing those loaded cars up on the tonnicas, and they had been employed in the same kind of work all the forenoon of that day. It appears that to push those loaded cars upon the tonnicas, it was necessary for the engine to get a good head of steam on before starting, and then the engineer must force his engine up as fast as he could, in order to mount the grade. In doing this work, the switch, where the accident happened, was passed over every time the engine went up on the tonnicas and came down again.

At the time of the injury the switching crew had started with some loaded cars to run them up on the tonnicas, appellee being on the foot-board at the forward end of the engine, and on the left side, McCanna, the switch boss or conductor, sitting in the middle or astride of the casting, and Wolf, the assistant yard master, sitting on the right

side of the beam of the engine. Just at the instant when the engine struck the three-throw switch, it left the track, running from thirty to sixty feet forward, when by reason of the elevation of the tracks it canted over to the left catching appellee's foot between the beam of the engine and the ground, causing the injuries complained of. McCanna and Wolf succeeded in stepping off from the engine in safety.

There is a conflict in the evidence as to the rate of speed at which the engine was running at the time it left the track, the testimony of the various witnesses placing it all the way from eight to thirty miles per hour.

The only questions of law raised in the case are, that the court erred in admitting evidence concerning the reputation of the engineer as to competency, and also, that the court erred in refusing appellant's motion to direct a verdict in its favor.

As to the first point we think there was no error. The weight of authority seems to be in favor of the competency of such evidence, and our own Supreme Court have so held. *Western Stone Company v. Whalen*, 151 Ill. 472, and authorities there cited.

The determination of the second point must depend on the question of fact as to whether the charge of negligence under either count of the declaration was proved by a preponderance of the evidence.

This was a question for the jury, and we can not say their verdict is so clearly against the weight of the evidence as to impose upon us the duty of setting it aside. On the contrary, we think a preponderance of the evidence shows that one of the switch rails, at the point where the engine left the track, was in a battered and unsafe condition, and there is some evidence to the effect it had been in such condition for about a month prior to the accident to appellee. It is true that engines had run over this battered rail in safety many times prior to the occasion which resulted in injury to appellee, and it is also true that an official of the company inspected the track only two or three hours before the acci-

dent, but, according to his testimony, the rail was battered, and by the testimony of other witnesses it appears to have been in a dangerous condition for such a length of time, and was of such a character that appellant, in the exercise of reasonable care, should have known of, and remedied, the defect. The accident happened at the point where the battered rail was in the switch; its condition sufficiently accounted for the engine leaving the track, and we think the jury were warranted in finding that the injury to appellee resulted from a want of due care on the part of appellant in endeavoring to keep its track in a reasonably safe condition. To ascribe the accident to any other cause but the battered rail would be but to indulge in surmise or speculation. There being sufficient evidence to go to the jury upon the question of appellant's negligence, we think the court did not err in refusing the motion to direct a verdict for appellant.

As we think there was evidence sufficient to warrant a recovery under the first count of the declaration, we do not deem it necessary to discuss the question, as to whether it was of a character to authorize a verdict under the second count. We can not say under which count the jury may have found their verdict, but so long as there was no improper evidence admitted, and one good count is proven, that is sufficient to sustain the verdict and judgment thereon. Complaint is made that the damages are excessive. This question was fairly submitted to the jury under proper instructions. They saw the appellee and his witnesses and heard them testify, and were in a better position to judge as to the amount of damages to which appellee was entitled than we are. The trial court required a remittitur of \$1,000, which was entered, and we can not say that the judgment of \$2,500 was unreasonable or excessive.

No complaint whatever is made of the instructions, and finding no error in the record the judgment will be affirmed.

Mr. Justice DIBELL took no part.

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1. **REPEALS—By Implication Not Favored.**—The law does not favor repeals by implication, and where there are two statutes on the same subject, the earlier continues in force, unless the two are clearly inconsistent with, and repugnant to each other, or unless, in the latter statute, some express notice is taken of the former, plainly indicating an intention to repeal it.

2. **POLICE POWER—State and Municipal Authorities May Exercise, Jointly.**—The grant of power to a city to make police regulations does not withdraw original jurisdiction on these subjects from the State. In matters of this nature the State and municipal authorities have concurrent jurisdiction.

3. **WEIGHTS AND MEASURES—City Ordinance as to, Not Repealed by State Law in Regard to Mine Inspectors.**—The act of 1895, whereby the mine inspectors of the State were made *ex officio* inspectors of weights and measures of coal in their respective districts, does not operate to repeal, either in whole or in part, a city ordinance providing for the appointment of a city inspector of weights and measures, and prescribing his duties.

4. **SAME—An Ordinance in Regard to, Sustained.**—An ordinance providing for the appointment of an inspector of weights and measures, prescribing his duties and establishing rules as to the use of weights and measures, is considered by the court, and held to be reasonable and a proper exercise of the power of the city.

5. **DEMURRERS—General and Special.**—Where special grounds of demurrer go to the substance of a declaration and not to its form, the demurrer amounts to a general demurrer and will be so treated.

Debt, for a penalty. Error to the Circuit Court of Bureau County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

J. L. MURPHY, attorney for plaintiff in error.

ALFRED R. GREENWOOD, attorney for defendant in error.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of debt brought by plaintiff in error, to recover a penalty for the alleged violation of an ordi-

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nance of the city of Spring Valley, in relation to the inspection of weights, measures and food. So much of the ordinance as is necessary to be considered in determining questions involved in this case is as follows:

“Be it ordained by the city council of the city of Spring Valley:

1. There is hereby created the office of inspector of weights, measures and food. He shall hold his office for the term of two years and until his successor shall be elected and qualified; said inspector shall be elected at the general city election in the year 1895, and biennially thereafter, by a vote of the legal voters of said city, the same as the mayor and other elected officers.

2. That there shall be a regulation of weights and measures in said city, and the standard adopted by the State of Illinois shall be the test by which they shall be compared and determined.

3. That the city council of said city shall procure correct and approved standards, with their necessary subdivisions, together with the proper beams and scales for the purpose of testing and proving by said standards the weights and measures used in said city.

4. It shall be the duty of said inspector once every six months to examine and test the accuracy of all weights, measures, scales or other instruments or things used by any person, firm or corporation for weighing or measuring any article or commodity for sale, or of which the manufacture or production or labor connected therewith is paid for by weight or measurement of the commodity produced or manufactured in said city; to stamp with a suitable seal, to be furnished by the city council of said city, all weights, measures, scales, instruments and things so used which he may find correct, and deliver to the owner thereof a certificate of their accuracy; to cause the owner of any weights, measures, scales or things so used which he may find incorrect on such inspection, to have same corrected and made conformable to said standard. Any person, firm or corporation that shall refuse to exhibit to said inspector any

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weights, measures, scales or other instruments used for weighing or measuring as aforesaid for the purpose of examination or inspection, as provided in this ordinance, or who shall refuse him access to the same in any place where the same shall be, or who shall otherwise obstruct him in the discharge of his duty hereunder shall, upon conviction, be fined not less than ten dollars nor more than fifty dollars for every offense.

5. All such weights, measures, instruments and things, beams and scales, found not to conform to the standard of the State of Illinois, shall be condemned by said inspector and shall not be again used until repaired or adjusted and tested by said inspector, and found to conform to said standard. Any person convicted of violating the provisions of this section shall, upon conviction, be fined not less than five dollars nor more than fifty dollars for every offense.

6. Every person, firm or corporation using any such weights, measures, scales, beams or other instruments for the purpose of weighing or measuring as aforesaid, which have been examined, certified and sealed as aforesaid, shall not alter the same, or knowingly permit the same to be altered or to become inaccurate; or knowingly cause the same to weigh or measure incorrectly; and shall at any time upon the application of said inspector, permit him to examine and test the same for the purpose of ascertaining whether the same have been altered or become inaccurate, or caused to weigh or measure incorrectly. Any person, firm or corporation that shall be convicted of violating the provisions of this section or any part thereof shall, upon conviction, be fined not less than three dollars, nor more than one hundred dollars for every offense.

7. It shall be the duty of said inspector to make and keep in a book furnished by the city council a regular register of all weights, measures, scales, beams, steelyards or other instruments inspected and tested by him, in which he shall state the names of the owner or owners of the same, and whether or not they were found conforming to the standard aforesaid, and the date of the certificate, if any, issued thereon.

8. It shall be the duty of said inspector whenever he may have reason to suspect the existence of false or incorrect weights, measures, scales, beams, steelyards or other instruments as aforesaid being in use in said city, or upon the written complaint of any reputable citizen of said city informing him of the existence thereof, to make immediate search for the same, and it is hereby made his duty to prosecute all persons violating this ordinance or any section thereof, by making proper complaint before any court having jurisdiction of the matter as otherwise prescribed under the ordinances of this city and the laws of the State of Illinois.

9. It shall be the duty of said inspector, within five days after his semi-annual inspection as aforesaid, to publish in the newspaper selected by the city council to publish the ordinances of said city, a notice stating that he has made such semi-annual inspection, and notifying all persons, firms and corporations who shall or may after said inspection and before the next succeeding semi-annual inspection, use, as aforesaid, any weights, measures, scales, beams or other instruments for weighing or measuring as aforesaid any article or commodity in said city, and which may not have been so examined as aforesaid, to bring, or cause to be brought to a place in said city designated in said notice, all such weights, measures, scales or other instruments not examined as aforesaid, and which may be susceptible and capable of removal to such place for the purpose of examination and inspection; and the said owner or owners of any such instrument as is not capable or susceptible of removal as aforesaid, shall notify said inspector of the place and situation of such beam, scales or other instrument not so capable of removal as aforesaid, and it shall thereupon be the duty of said inspector to go to said place and inspect and test said beam, scale or other instrument as provided in this ordinance; and any person, firm or corporation who, after the publication of the notice above mentioned, shall not, within ten days after commencing to use such beam, scale or other instrument, comply with the requirements of

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this section shall, upon conviction, be fined not less than three dollars nor more than fifty dollars for every offense.

* * * * *

17. Whoever shall directly or indirectly resist, obstruct or otherwise interfere with said inspector in the legal discharge of his duties, shall upon conviction in cases where no other penalty is prescribed by the ordinance of said city, be fined not less than \$25 nor more than \$100 for each such offense.

18. The said inspector shall receive as his compensation, a salary of \$50 per month; and in addition to such salary he shall be allowed to collect and receive from the owners of articles and instruments tested and sealed by him the following fees of office :

For inspecting, sealing and certifying to the accuracy of platform scales of 5,000 pounds or upwards, including weights, \$3; scales less than 5,000 pounds and exceeding 1,000 pounds, including weights, \$1; of less denominations, including weights, 50 cents each; for inspecting and sealing large beams weighing 1,000 pounds and upwards, including weights, 50 cents; for inspecting, sealing and certifying to the correctness of scales smaller than above stated, 15 cents each; counter scales, including weights, 15 cents; for comparing and sealing any measures, bushel 10 cents; smaller measures 5 cents; for inspecting, testing and certifying to the correctness of any scales which shall be the property of and controlled by the city as a public scale, he shall do the same free of charge.

19. Said inspector shall devote all his time to the duties pertaining to his office under the laws of this State and the ordinances of this city; he shall have an office or headquarters at the city hall building in this city, and shall attend at such headquarters from time to time for the transaction of business or matters pertaining to his office on every day of the year except Sundays and legal holidays."

Which ordinance was passed and approved March 11, 1895.

The declaration contained one count, setting out the entire

ordinance in *haec verba*, but as sections numbered 10 to 16 both inclusive, relate only to the inspection of food, and have no bearing upon the questions involved, we have omitted them. It was averred in the declaration that on the 16th day of July, 1895, the defendant in error owned and operated in said city two large scales, for the purpose of weighing coal mined by certain miners in a mine in said city, so that the miners could be paid for such mining at a certain agreed price per ton, and for the purpose of selling said coal by weight, as so weighed. It was further averred that one E. A. Frankey, who was then and there the inspector of weights, measures and food in said city, did on the 16th day of July, 1895, inspect and test both of said scales, ascertained that they did not weigh accurately, and were not conformable to the standard of the State of Illinois as adopted in and by said ordinance, stamped and marked the same "condemned" and so notified defendant in error; and avers that on one hundred distinct occasions, and on every day between the 16th and 25th days of July, A. D. 1895, defendant in error weighed coal on said scales without having the same repaired or adjusted by said inspector, and on every one of said occasions did violate said ordinance and particularly section 5 thereof. The declaration also counts for a failure to pay the inspector's fees for various inspections of scales alleged to have been made by him as such inspector, averring that defendant in error did thereby resist, obstruct and interfere with said inspector in the legal discharge of his duties under said ordinance, and did thereby violate said ordinance and particularly section 17 thereof, to the damage of the plaintiff of \$1,000.

To this declaration defendant in error filed a special demurrer, assigning as grounds of demurrer the following, to wit:

1st. The ordinance of the city of Spring Valley set out in said declaration is in conflict with the law of this State.

2d. The said ordinance is special and not general in its application.

3d. It contravenes common rights.

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4th. It is unreasonable and therefore void.

On a hearing of the demurrer it was sustained, and the plaintiff in error electing to stand by its declaration, judgment was rendered against it for costs of suit, and it brings the cause here on writ of error.

While numerous errors are assigned, the only question argued is, as to whether or not the court erred in sustaining a demurrer to the declaration, and this is the only point we deem it important to consider.

We must take judicial notice that the city of Spring Valley is a municipal corporation incorporated under the general law of this State. *City of Rock Island v. Cuinely*, 126 Ill. 408.

Among the powers conferred on such corporations, are the following:

“To provide for the inspection and sealing of weights and measures.”

“To enforce the keeping and use of proper weights and measures by vendors.” (See sections 55 and 56, Art. V, Chap. 24 R. S., 1 Starr & Curtis, 469.)

It would seem clear, and in fact it is not denied, that these provisions of the statute are broad enough to warrant the city in adopting the ordinance in question (except as to some points wherein it is claimed to be unreasonable), but it is contended by defendant in error that this ordinance has been repealed and abrogated by an act of the legislature passed June 4, 1895, and in force July 1, 1895, whereby mine inspectors of this State were made *ex officio* inspectors of weights and measures of coal in their respective districts, and they were empowered, and it was made their duty to test the scales used in such district to weigh coal mined in coal mines, or sold, at least once in every six months, to ascertain whether the scales were accurate, and to report any defects or irregularities in such scales to the mine owner, and direct the same to be at once properly adjusted or corrected. And by the second section it was provided that if the owner or operator should refuse to allow such inspectors to properly test the scales used at such mines, or

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shall fail or refuse to put such scales into proper condition to correctly weigh coal, upon being notified so to do by such inspector, such owner or operator shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding \$500, or confined in the county jail not exceeding six months, or both, in the discretion of the court. And it was made the duty of State's attorneys to prosecute for any violation of the act in their respective counties. Session Laws 1895, p. 255.

The defendant in error insists, and the court below held, that this act of the legislature worked a repeal of the city ordinance, so that the latter is no longer in force or of binding effect, so far as scales at mines are concerned. If this position is correct, plaintiff in error has no case, and the demurrer was properly sustained to the declaration.

It is to be observed that the act of the legislature itself contains no words of repeal, nor does it in any way purport to interfere with or limit the powers of municipal corporations to pass and enforce police regulations of the character in question. It follows that if so much of the ordinance as relates to testing scales at mines is repealed by the act of the legislature, such repeal arises or is effected only by implication of law. "It is a maxim in the construction of statutes, that the law does not favor a repeal by implication. The earliest statute continues in force, unless the two are clearly inconsistent with and repugnant to each other, or unless in the latest statute some express notice is taken of the former, plainly indicating an intention to repeal it. And when two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication." *The Town of Ottawa v. The County of La Salle*, 12 Ill. 339, and authorities there cited.

In an earlier case it was said: "The doctrine of repeal by implication is not favored by the law, and is never resorted to except when the repugnance or opposition is too clear and plain to be reconciled." *Bruce v. Schuyler et al.*, 4 Gilm. 221. And again in *The People ex rel. v. Brayton*,

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94 Ill. 341, the court say : " To repeal a statute by implication there must be such a positive repugnance between the provisions of the new law and the old that they can not stand together or be consistently reconciled."

The law is so well settled upon this proposition, that further citation of authority is unnecessary.

The material question presented for our consideration, therefore, is whether or not there is such a repugnancy or inconsistency between the city ordinance and the act of the legislature, as necessarily requires us to hold that the former is repealed by implication. After a careful examination of the ordinance and the statute, and a comparison between the two, we have been unable to come to the conclusion that such repugnancy exists as to prevent their both standing together. The ordinance is a mere police regulation of the city which it had full power under the general law to adopt. It is general in its nature, operating alike upon all classes of persons within the city using weights and measures or dealing in food. An action for its violation is nothing more than a civil proceeding to collect a penalty. The statute is special, applying only to mine owners or operators and their agents in all parts of the State. It is in its nature criminal, and a prosecution under it would be by indictment or information.

Cities have power under the general law to pass ordinances to suppress bawdy and disorderly houses, gaming and gambling houses; to license, regulate and prohibit the sale of intoxicating liquor; to prevent intoxication, fighting and all disorderly conduct, and many other police regulations. In matters of this nature, the State and municipal authorities have concurrent jurisdiction, and in the absence of a prosecution by the city, the State may interfere. It has never been held, so far as we are aware, that the granting of these powers to municipal authorities withdrew original jurisdiction upon these subjects from the State. The contrary doctrine was held in *Seibold v. The People*, 86 Ill. 33.

It is true that in the case at bar, the city ordinance and the

statute differ in the maximum and minimum penalties imposed, but we do not think that fact necessarily creates such a conflict between the two that they can not stand together.

Nor do we think there is any force in the argument that the city inspector and the State inspector may not be in harmony in their tests and inspection of scales, nor that the city inspector may so act as to create an unnecessary burden upon mine operators within the city of Spring Valley. We must presume that these officers will only do their duty, and if they do, there can be no want of harmony. There can be only one correct standard, and that is provided for by general law. Chap. 147, Revised Statutes (2 Starr & Curtis, 2461). By this law the secretary of state is the State sealer of weights and measures, and county clerks are county sealers. It is made the duty of county clerks, as such sealers, when requested so to do, to try and prove all weights and measures, scales and beams, and when found to conform to the correct standards, to mark such weights and measures with a seal to be kept for that purpose. And a penalty is provided for selling or buying by any other weights or measures than such as conform to the proper standard. Here there is a law of the State, in force for many years, which provides a still different penalty from the city ordinance or the act of 1895, general in its nature and broad enough in its terms to include scales at coal mines, and by the same reasoning which insists upon a repeal of the ordinance, this law, so far as it affects scales at coal mines, must also be held to be repealed by implication. In the absence of any evidence in the act of 1895, of a legislative intent, to repeal former laws or ordinances upon the same subject, we are unwilling to adopt a construction which would bring about such a result. Should there be any conflict between the inspections made by the city inspector and the State inspector, an application to the county sealer, who has in his custody the correct State standards, would settle any controversy which might arise. But we think any difficulty of that nature is more imagin-

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ary than real. We do not see that the ordinance is unreasonable.

Our conclusion is, that the city ordinance was not superseded or to any extent repealed by the act of 1895, but still remains in full force.

We think the court should have overruled the demurrer to the declaration. While it may have been somewhat defective in manner of statement, yet the special grounds of demurrer were to the substance of the declaration, and not to its form, and hence amounted only to a general demurrer, and under such a demurrer we think the declaration was sufficient.

For the reasons given the judgment will be reversed and the cause remanded.

DIBELL, J., took no part.

Town of Rutland v. Chicago & Northwestern Ry. Co.

1. RAILROADS—*Liability of, for Maintenance of Bridges on Highways.*—By an agreement between a railroad company and a municipality, the channel of a creek at a point where it crossed a highway was filled up, a new channel dug, an old bridge across the original channel removed, a new bridge erected across the new channel, and the right of way of the railroad located where the original bed of the creek had been. A new bridge becoming necessary, the municipality built it and brought suit against the railroad. *Held*, that when the first bridge was constructed the railroad company had performed its duty, and was under no obligation to repair or rebuild it unless it was rendered necessary by a changed condition produced by the act of the company.

2. SAME—*Approaches to Crossings.*—The approaches to a railroad crossing do not necessarily extend the entire width of the right of way, and in this case the court does not regard the place where a bridge is located as any part of the approach to the railway crossing, and holds that the company is not bound to keep such bridge in repair.

Assumpsit, against a railroad company for money expended in building a bridge. Appeal from the Circuit Court of Knox County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

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IRWIN & EGAN and J. W. RANSTEAD, attorneys for appellant.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee, to recover for a part of the costs incurred in rebuilding a bridge over Tyler creek, in Kane county, at a point on the highway leading over, and near to, the railway track of appellee in said town of Rutland. The declaration, as originally filed, declared upon a contract alleged to have been made between appellee and appellant to jointly maintain the bridge in question. By an amended declaration subsequently filed, the theory of liability under a contract was abandoned, and appellant set up the statutory duty of the company to repay a proportionate share of the expense for rebuilding the bridge, on the ground, as claimed, that a part of the bridge being within appellee's right of way, it constituted an "approach" to the crossing of the railway, which appellee was bound to maintain and keep in repair. The action seems to have been based on sections 71 to 74 (inclusive) of Chap. 114 of the Revised Statutes (2 Starr & Curtis, 1837).

The cause was tried by the court without a jury, the issues found for appellee, and judgment rendered against appellant for costs. It brings the case to this court by appeal, and asks a reversal of the judgment on the sole ground that it should have been in its favor instead of in appellee's favor. No propositions of law were submitted to the court below, and consequently none are saved in the record.

The facts, as shown by the evidence, appear to be that prior to the construction of appellee's railroad, Tyler creek crossed the highway in question, about the point where the center of the railroad track now crosses the highway, and at that point there was a highway bridge across the creek. By some arrangement between the town and the railroad company (the terms of which do not clearly appear), the old

channel was filled up at this point of intersection, and a new channel dug a little east of the old channel; the old bridge was removed, and a new bridge erected across the creek as changed to its new location, and the railroad was located about at the point where the original bed of the creek had been. The railroad company paid a part of the expense of building the new bridge. The right of way of appellee at this point where the bridge crosses the creek, is one hundred feet in width, or fifty feet on each side of the center line of the track as now located. Measuring fifty feet easterly along the highway shows that eighteen feet and ten inches of the bridge are within the railroad company's right of way.

The bridge having become worn out and unfit for use, a new one became necessary, and appellant thereupon served a notice on appellee to contribute to the rebuilding of the bridge, and sixty days thereafter erected a new bridge at a cost of \$275 for the bridge and \$15 for grading, and brought this suit to recover such cost, or the proportional part for that portion which is upon the right of way.

It does not appear that any contract is now in force requiring appellee to contribute to the expense of maintaining the bridge in question, and if there is any liability, it must be upon the ground that the portion of this bridge which is in the right of way constitutes an "approach" to the railroad track, which, under the statute, appellee is bound to maintain and keep in repair. Counsel for appellant in their argument say: "The only question in this case is, is said bridge a part of the approach to the crossing within the meaning of the statute?" No complaint seems to be made of the approach from the west end of the bridge to the track, and hence it seems to us the only question is, can the railroad company be held liable in this action for the payment of any part of the costs of rebuilding this bridge, as a bridge, and not as a mere approach to the crossing of the track? It is earnestly urged by appellant, that this bridge was made necessary by the construction of the railroad, and therefore in order to restore the highway to its original

state of usefulness, appellee must erect and maintain the bridge. But it must be admitted that there was a bridge across the creek near the point before the building of the railroad, and if the railroad had never been constructed, such a bridge would still have been necessary. It is true that by filling up the original channel and cutting the new one, a bridge was rendered necessary at the precise point where now located, but this was done by the consent of appellant, and it must be presumed that the arrangement was satisfactory to it at the time, and in the absence of any evidence as to a contract for further liability on account of the change in the channel, it must be concluded that all matters in relation thereto were satisfactorily adjusted.

By the building of the bridge across the new channel when the railroad was constructed, appellee had performed its statutory duty of restoring the highway to its former condition, so as not to materially impair its usefulness, and there its obligation ended. No duty developed upon it of thereafter maintaining the bridge unless it was rendered necessary by some changed conditions produced by the act of appellee. We think this case falls within the principles laid down by the court in *O. M. Ry. Co. v. Town of Bridgeport*, 43 Ill. App. 89, and in the same case reported in 63 Ill. App. 224, and must be governed by the decisions in that case, which have our entire concurrence.

Within the definitions given in the above case, and also in *City of Bloomington v. I. C. R. R. Co.*, 154 Ill. 539, we do not regard the place where the bridge in question is located, as any part of the "approach" to the railroad crossing, and under the evidence the railroad company was not bound to maintain or keep it in repair, and hence is not liable for any part of the costs of rebuilding it.

We think the judgment of the court below was right and it will be affirmed.

Acme Coal Company v. Susie Kusnir, Adm'x.

1. **NEGLIGENCE—*Not Established by the Evidence.***—From a careful consideration of all the evidence in this case, giving the plaintiff the benefit of all legitimate inferences to be drawn therefrom, the court holds that appellee has not made out a case of negligence against appellant, and that the motion to exclude the evidence and direct a verdict for the defendant should have been allowed.

2. **EVIDENCE—*As to the Possibility of Preventing an Accident.***—In a suit against a coal company for injuries caused by falling stones, evidence of experts to show that there is no method known to miners whereby the danger arising from falling stones can be entirely obviated, is proper.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Reversed, with finding of facts. Opinion filed September 20, 1897.

REEVES & BOYS and DAVID ROSS, attorneys for appellant.

GEO. W. W. BLAKE and GEO. E. GLASS, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover damages alleged to have been sustained by the appellee as widow of John Kusnir, deceased, who was killed on June 4, 1895, by the falling of a stone from the roof of a passageway in the coal mine of appellant, in which deceased was employed at the time of his death.

The declaration contains several counts, and the gist of the negligence charged against appellant is a failure to use reasonable care to see that the roof of the mine and the passageways therein were sufficiently propped, so as to prevent its falling and doing injury to the men employed therein, including appellee's intestate.

There was a trial by jury, resulting in a verdict in favor

of appellee for \$2,500. A motion for a new trial being overruled, there was judgment on the verdict, and the defendant appealed to this court.

Various errors are assigned upon the record, but the only one we care to consider especially is, the refusal of the court, at the close of all the evidence in the case, to exclude it and direct a verdict for the defendant; such a motion having been made by appellant and properly preserved in the record. This motion submitted to the court the question as to whether or not, all the evidence being considered, and giving the plaintiff the benefit of all legitimate inferences to be drawn therefrom, she had proven a cause of action. To the consideration of this question we have given full and earnest attention, and upon a careful reading of all the evidence, we are constrained to hold that appellee has not made out a case of negligence against appellant.

The facts of the case, as shown by the evidence, appear to be substantially as follows: Appellant is a corporation operating a coal shaft just east of the city of Streator, in La Salle county. This shaft was about one hundred feet deep and from the bottom of the shaft, entries were driven in various directions. From these entries, and at right angles thereto, rooms are turned or driven, and in each room the coal is gotten out by the miners, sometimes one man, and sometimes two men, working in each room. The plan adopted for mining, in the mine in question, was what is known as the double-entry system; that is, two parallel entries are driven in the same direction and about twelve feet apart, leaving a pillar or rib of coal between the two. From time to time an opening is made through this rib of coal, thus connecting the two entries, and these openings are called cross-cuts. The object of this system is to allow a free circulation of air forced through these various openings and passageways, by means of a fan or other appliance, from the bottom of the shaft. The rooms in appellants' mine were about twenty feet wide, and between the rooms a rib, or pillar of coal, was left, about nine feet wide.

At the time of the accident there was in the mine an

entry, known as the "first right entry," and another running parallel with it, called the "second right entry." From the first entry a number of rooms had been turned, which were numbered, commencing with No. 1, where the entry started.

At the time of the accident Mr. Atkinson was manager of the mine, with power to employ and discharge men, and had general supervision of the mine. Robert McDonald was pit boss and had immediate charge of the work. William Gray was the fire boss, and it was his duty to examine the mine each morning before the men went to work, to see that it was free from gas, and that the roadways were in a safe condition, and to make a written report of his inspection, and leave the report where men employed in the mine could have the opportunity to see it.

On the day of his death, deceased applied to appellant for employment, which he received, and the pit boss, McDonald, directed John Bakolar, one of the miners, to show deceased to room No. 8, on the first right entry, where he could go to work. Bakolar worked in the next room, No. 7. Aftershowing Kusnir to room No. 8, Bakolar and his mate (or "butty," as he called him) went to work in their room, and in about five minutes Kusnir came into No. 6, where he stayed about half an hour, and then left, saying he was going home. About thirty minutes after Kusnir had gone Bakolar heard some one calling in the entry, and upon going there found Kusnir between rooms Nos. 4 and 5, with a large piece of rock, which had fallen from the roof, on top of him. He was taken from the mine to his home and died the same evening. The evidence shows he was an experienced miner, and had worked in coal mines in and about Streator for several years.

The only evidence tending to show negligence on the part of appellant is the testimony of two witnesses, Andrew Palanos and Michael Dutko, Hungarians and fellow countrymen of deceased.

We are bound to say that the testimony of these two witnesses is overwhelmingly contradicted and overcome by the

testimony of a much larger number of witnesses, having certainly as full opportunity of observation as Palanos and Dutko, and apparently fully as truthful and honest. The testimony of these two witnesses tended to show that they had observed an unsafe place in the roof of the passageway prior to the accident to deceased, but they are not certain or definite as to the exact location, even though it be conceded they had seen such unsafe place, and their testimony, taken in its entirety, leaves it uncertain as to whether the place they claimed to have observed was the precise spot where Kusnir was hurt or not. On the whole, we think their testimony is so uncertain and improbable as to be unreliable.

On the other hand, the witness Gray, fire boss for appellant, testified to having made a careful inspection of the mine on the day of the accident, and a test of the roof at the particular place where deceased was hurt, by sounding it in the usual way, and found it all right, and that there were no cracks in the roof at that point. Of this inspection the witness made a report as required by law. He also testifies that the break in the stone which killed deceased was a fresh break. On cross-examination, he swears that there were props at this particular place, with cap pieces on the props, and a cross-bar right behind it, and that they couldn't get more timber under it to make it any safer. This man's long experience, as a miner for thirty-five years, and as fire boss for six years, qualifies him to speak as an expert on matters of this nature. Robert McDonald, the pit boss, testified that he passed under that roof twelve or fourteen times that afternoon, and that there was no break in it, and nothing to indicate that it was unsafe and liable to fall.

Thomas C. Cummings, State inspector of mines for the district in which appellant's mine is located, was notified of the accident by telegram, and went to the mine to make an examination of the place where Kusnir was hurt. He found the stone that killed deceased, which he calls "free stone," and in his opinion the break was a fresh one, and he gives it as his opinion the stone was pinched off, the prop under

it acting as a fulcrum. From his testimony it would appear that even had there been a cross-bar on top of the two props, it would not have prevented the fall of the rock. He further swears that the place where the rock fell seemed to be secured in the ordinary manner in which such places are secured.

From a careful consideration of all the evidence, we fail to see wherein appellant neglected any duty it owed to deceased, in using ordinary care to properly support the roof of the mine where he got hurt. No doubt such accidents occur sometimes, when all proper precautions are used to avoid them, and we are of the opinion such was the fact in this case. However unfortunate the accident was for appellee, we do not think appellant was responsible for it. Evidence was offered from these expert witnesses to show that there is no method known to miners whereby the danger arising from falling stones, occasioned by the settling of the roof above, can be entirely obviated, but the court refused to admit it, and in this we think there was error. However, the very nature of the business, and the common experience of men engaged in it, satisfies us that this is true, and although this evidence was excluded, there is enough in the record to convince us that the accident to Kusnir was not the result of any want of reasonable care on the part of appellant.

In our judgment, appellee has not proven, by a preponderance of the evidence, that the death of her intestate was caused by the negligence of appellant as charged in the declaration. We think the court should have sustained appellant's motion to direct a verdict in its favor, and it was error to refuse it. In this view of the case we deem it unnecessary to discuss any of the other errors assigned.

The judgment will be reversed.

FINDING OF FACTS TO BE MADE A PART OF THE JUDGMENT.

We find as a fact that the deceased, John Kusnir, came to his death as the result of an accident not attributable to negligence or want of ordinary care on the part of appellant.

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And we further find as a fact, that the appellant had used all reasonable care to have the roof of the mine, at the place where deceased was injured, in a proper and safe condition, and that it was in a reasonably safe condition at the time of the accident which caused his death.

Fred F. Roberts v. Orson Kingsbury.

1. **CHATTEL MORTGAGES—Not Acknowledged and Recorded as Required by Statute, Void as to Purchasers.**—An instrument intended by the parties as a mortgage or pledge, and not acknowledged and recorded in the manner required by the statute, never becomes effective as a valid chattel mortgage, and has no force or validity as such, as against subsequent purchasers, whether with or without notice.

2. **SAME—An Instrument Held to be a Chattel Mortgage.**—The court holds, that under the evidence in this case, there can be no doubt that the bill of sale to appellee was intended by the parties simply as a mortgage or pledge to secure a debt owing to him.

3. **SALES—Purchaser in Possession Held Entitled to Property Against Unrecorded Bill of Sale.**—A person who purchases property from a wife, with the consent and acquiescence of her husband, and takes immediate possession of it, has the right to hold it as against an unrecorded bill of sale executed by the husband, even where the wife is also a party to the bill of sale.

Replevin.—Appeal from the County Court of DeKalb County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

JONES & ROGERS, attorneys for appellant.

THOMAS M. CLIFFE and J. N. FINNEGAN, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of replevin brought by appellee against appellant to recover the possession of two black mares, one

buggy phaeton, one two-seated surrey and one candy wagon. The declaration contained three counts, one in the *cepit*, one in *detinet* and one in trover. The pleas were first, *non cepit*; second, *non detinet*; third, not guilty; fourth, property in defendant, except as to the candy wagon; fifth, that the phaeton and surrey at the time of the replevin were in the possession of one Harrison Grimm; and sixth, that the candy wagon, described in the affidavit and declaration, was the property of, and in the possession of, one Daniel D. Hollinger, and that defendant claimed no right or title to it, and never had it in his possession.

There was a trial by jury, resulting in a verdict in favor of appellee for all the property replevied, including the candy wagon. After overruling a motion for a new trial, the court entered judgment on the verdict.

Appellee claimed title to the property under an instrument in writing, of which the following is a copy :

SYCAMORE, ILLINOIS, September 11, 1896.

This is to certify that I have this date sold to Orson Kingsbury one span of black mares, named Midnight and Darkness, one two-seated surrey, one buggy phaeton and one candy wagon, known as the Lovel wagon.

WILL C. KINGSBURY.

SEPTEMBER 11, 1896.

I hereby promise to sell the said team and wagons, etc., to Will C. Kingsbury for \$400, and allow said Will C. Kingsbury to use the said team until he buy same from me.

ORSON KINGSBURY.

Appellant claimed title to the same property, except the candy wagon, by virtue of a bill of sale from May Kingsbury, wife of said Will C. Kingsbury, of which the following is a copy :

SYCAMORE, ILLINOIS, November 24, 1896.

I, the undersigned, sell to F. F. Roberts my phaeton with tongue and thills, team of black horses, harness, one two-seated buggy, all robes and blankets, and have received payment in full for same.

MAY KINGSBURY.

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Under the last mentioned bill of sale appellant took immediate possession, which he held at the time the replevin writ was issued.

There can be no doubt, under the evidence, that the bill of sale from Will C. Kingsbury to appellee was intended by the parties simply as a mortgage or pledge, to secure a debt owing by the former to the latter; and not having been acknowledged or recorded in the manner required by the statute, it never became effective as a valid chattel mortgage, and had no force or validity as such, as against subsequent purchasers, whether with or without notice. *Porter v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Id. 478; *Long v. Cockern et al.*, 128 Id. 29.

The evidence shows that appellee never had possession of any part of the property, no delivery having ever been made under the bill of sale to him, because the understanding of the parties to that transaction was, that it should be kept a secret between themselves.

We think a clear preponderance of the evidence shows that the span of mares, the phaeton and surrey, were the separate property of May Kingsbury, purchased by her with her own money, derived from teaching school before she was married to Will C. Kingsbury, and that she had full right and power to sell them to appellant as she did. She was no party to the transaction between her husband and appellee, and was in no way bound by the bill of sale; but even if she had been, appellant, who purchased the property from her with the consent and acquiescence of her husband, and took immediate possession of it, would have the right to hold the same as against the unrecorded bill of sale to appellee.

Our conclusion is that the verdict was against the weight of the evidence, and the court erred in overruling the motion for a new trial. There was no evidence whatever upon which to base a verdict against appellant for the candy wagon, and a judgment against him therefor was manifestly wrong.

Complaint is made by appellant that the court erred in

refusing the fifth instruction asked in his behalf. In this action of the court we think there was no error. While the instruction embodied a correct principle of law, yet, as drawn, it was faulty in assuming that appellant bought the property in controversy, from May Kingsbury, without submitting that question as a fact to be found by the jury from the evidence.

Other complaints are made by appellant as to the action of the court upon the instructions, but we do not deem it necessary to consume time in considering them. If any errors were committed, they can easily be remedied on another trial, in conformity to the views herein expressed.

For the error indicated, in overruling the motion for a new trial, the judgment will be reversed and the cause remanded.

Vincent J. Reinke v. John Jacobs.

1. **VERDICTS**—*Sustained by the Evidence.*—There is some evidence in the record in this case, of a request for the performance of the services which form the basis of the plaintiff's claim; and if it was believed by the jury, it was sufficient to justify their conclusion, and their verdict must stand.

2. **INSTRUCTIONS**—*Ignoring a Theory of the Defense.*—The instructions asked for by the plaintiff in error, and refused by the court, entirely ignored the theory that the work sued on had been done by request, and were properly refused.

Assumpsit, for services. Error to the Circuit Court of Bureau County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

J. L. MURPHY, attorney for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Defendant in error sued plaintiff in error to recover for

Reinke v. Jacobs.

services alleged to have been performed in cleaning out a privy vault belonging to plaintiff in error, situated on lot 11, block 42, in the city of Spring Valley. On a trial before the justice of the peace, defendant in error recovered judgment for \$43.50. On appeal to the Circuit Court and a trial *de novo* in that court, there was a verdict in favor of defendant in error for \$43, and a motion for new trial being overruled, judgment was entered on the verdict. Plaintiff in error brings the cause here, and assigns various errors.

Defendant in error claimed to be city scavenger under the ordinances of the city of Spring Valley, and that the vault above mentioned was foul and dangerous to the public health; that in pursuance of the ordinances of the city, he served notice on plaintiff in error to have such vault cleaned out, which the latter failed and neglected to do, and thereupon defendant in error cleaned out the vaults, and charged the plaintiff in error therefor at the rate of three dollars per cubic yard of filth removed from the vault, which was the price fixed by the ordinance. The evidence shows the amount of material removed was a little over fourteen and one-half yards. There is no evidence in the record disputing the amount of work done, nor the value of the services, but it is insisted that there is no sufficient evidence that defendant in error was city scavenger, or that the proper notice was served as required by the ordinance. But aside from the question of defendant in error's right to clean the vault and charge therefor as city scavenger, there is some evidence of a request by plaintiff in error to defendant in error to clean the vault, and authority by the former to the latter so to do. If this evidence was believed by the jury it was sufficient upon which to base their verdict. The jury saw the witnesses and heard them testify, and had the right to give credence as they thought warranted by the facts and circumstances appearing before them. Defendant in error did the work of which plaintiff in error had the benefit, and there is no pretense it was not worth what he charged.

We do not deem it necessary to set out the city ordinance, nor to discuss the question as to whether defendant in error was city scavenger or not, nor the question of notice. If the work was done upon request, that was sufficient ground for a recovery.

The instructions given for defendant in error, we think, correctly stated the law. Those refused on the part of plaintiff in error entirely ignored the theory of the work having been done by request, and were properly refused.

We think justice has been done and the judgment should be affirmed.

Judgment affirmed.

Mr. Justice DIBELL took no part.

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City of Joliet v. Mary Ann Adler, Ex'x.

1. **MEASURE OF DAMAGES**—*For Excavations and Changes of Grade in a Street.*—In a suit to recover for damages to property caused by an excavation and change of grade in a street, the true measure of damages is the difference between the fair cash market value of the property immediately before the improvement was made and unaffected by it, and the fair cash market value of the property immediately after the construction of the improvement, and as affected by it.

2. **EVIDENCE**—*As to Damages to Property Caused by Improvements in a Street.*—In a suit to recover for damages to property caused by an excavation and change of grade in a street, a witness was asked whether the matters complained of had any effect upon the rental value of the property, and answered that it "wouldn't be so desirable to live in." *Held*, that while rental value is not an element in the estimation of damages in this class of cases, the question and answer could have done no harm.

3. **SAME**—*As to the Effect of Street Improvements on the Appearance of Property, in a Suit for Damages.*—In a suit to recover for damages to property caused by an excavation and change of grade in a street, a witness was permitted to testify as to how the appearance of the property was affected. *Held*, that all the elements which tended to affect the salable value of the property were proper matters for the consideration of the jury, and that under this rule the evidence was admissible.

4. **PRACTICE**—*Objections for Variance Should be Specific.*—The objection that there is a variance between the allegations and the proofs

City of Joliet v. Adler.

should be raised in the trial court, and the precise variance claimed to exist should be pointed out specifically so that the opposite party can have an opportunity to amend.

Trespass on the Case, for injuries to property caused by an excavation and change of grade in a street. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

COLL McNAUGHTON, attorney for appellant.

C. W. BROWN, attorney for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover for damages to property belonging to the estate of appellee's testator, abutting on Hickory street in the city of Joliet, by reason of an excavation and change of grade in said street, made by appellant. There was a trial by jury, resulting in a verdict and judgment in favor of appellee, for \$500.

The grounds urged for a reversal are that the court erred in admitting incompetent evidence; that there was a variance between the declaration and the proofs, and that the court erroneously refused appellant's first and fifteenth instructions. Also that the damages are excessive.

On the trial of the cause a witness was asked whether or not the improvement complained of had any effect upon the rental value of the property in controversy, which question was objected to by appellant; the objection was overruled by the court and the witness permitted to answer, which he did by saying the property "wouldn't be so desirable to live in."

While rental value is not an element in the estimation of damages in this class of cases—the true measure of damages being the difference between the fair cash market value of the property immediately before the improvement was made and unaffected by it, and the fair cash market value of the property immediately after the construction of the

improvement, and as affected by it—yet the question allowed by the court to be answered could have done no harm, even if not strictly proper, and no serious objections can be urged to the answers, which only go to the extent of showing that the property was less desirable as a residence after the improvement of the street than before. No attempt was made, either by the questions or answers, to show the rental value of the property before and after the improvement, as a basis for the estimation of damages. We think the court did not commit any serious error in this matter.

The witness Seely was permitted, over appellant's objection, to testify as to how the excavation in Hickory street affected the appearance of the property, and this is complained of as error. We do not think the point is well taken. While the true measurement of damages is as above stated, yet all the elements which tend to affect the salable value of the property, it seems to us, are proper matters for the consideration of the jury, and with most people the appearance of property would have some influence upon their estimate of its value.

At the close of all the evidence, appellant asked a peremptory instruction directing a verdict in its favor.

It is now insisted that this instruction should have been given, because there was a variance between the allegations of the declaration and the proofs. The objection comes too late. A careful examination of the abstract fails to show that this question was raised in any manner in the court below, either by objections to evidence, by motion, or by instructions. The cases are numerous in which it has been held that in order to avail of a matter of this kind, the party objecting must have pointed out to the court below the precise variance claimed to have existed, so that the opposite party could have an opportunity to amend, as he would have had the right to do under our practice act. *St. Clair Co. Ben. Society v. Fietsam*, Adm'r, 97 Ill. 480; *C., R. I. & Pac. Ry. Co. v. Clough*, 134 Id. 594; *Probst Con. Co. v. Foley*, 166 Id. 31.

It is insisted that the court erred in refusing appellant's

first and fifteenth instructions. The first was a peremptory instruction to find the defendant not guilty, and was properly refused. All that was proper in the fifteenth instruction, refused, appears to have been embodied in other instructions given at the instance of appellant, and it was not error for the court to refuse it.

Upon the question of damages, there was a conflict in the evidence; the jury, however, not only saw and heard the witnesses, but by agreement of parties they went and viewed the premises for themselves, and this view the jury had the right to regard as evidence in the case. We can not say the damages were excessive.

Finding no material error in the record, the judgment will be affirmed.

Mr. Justice DIBELL took no part.

Cleveland, C., C. & St. L. Ry. Co. v. Olive S. Case.

1. *RAILROADS—Liability of, for Damages Caused by Fires Set by Sparks from a Locomotive.*—To overcome a *prima facie* case made by a plaintiff in a suit against a railroad company to recover damages for the destruction of property by fire, set by sparks from a locomotive engine belonging to the defendant, it is necessary to show that the engine was being properly handled at the time the fire was communicated to the plaintiff's property.

2. *SAME—Evidence as to Spark Arresters in Suits to Recover for Injuries Caused by Fire.*—In a suit against a railroad company to recover damages for the destruction of property by fire set by sparks from a locomotive, certain appliances used in locomotives for the purpose of arresting sparks were inspected by the jury by consent. At the close of the evidence the defendant offered the following instruction: "You have been permitted during this trial to view and inspect a screen or perforated plate, for the purpose of enabling you to better understand the facts of the case, but I now instruct you that you are not to consider any fact observed by you while making such inspection, or any inference which you may have drawn from such inspection, as evidence upon any question in this case." *Held*, that under the circumstances the instruction was properly refused.

Trespass on the Case, for injuries caused by fire. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

S. O. BAYLESS, attorney for appellant; JOHN T. DYE and THOS. P. BONFIELD, of counsel.

H. K. WHEELER, attorney for appellee.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover damages for the destruction of property owned by appellee, in consequence of being set on fire by sparks escaping from one of appellant's locomotive engines at the village of Waldron, in Kankakee county, about 8:30 o'clock on the evening of October 12, 1896.

There was a trial by jury, and a verdict in favor of appellee for \$520, upon which the court entered judgment after overruling a motion for new trial, and appellant brings the cause to this court.

It is not disputed that appellee's property was destroyed as alleged in the declaration, but the defenses set up by appellant are, first, that the locomotive was equipped with the best known appliances to prevent the escape of fire or sparks therefrom; second, that it was in good repair; and third, that the engine was skillfully and carefully handled by a competent engineer. It is substantially conceded, that if these facts be proven, they constitute a complete defense to the *prima facie* case made out by appellee, it having been proven that the fire was caused by sparks escaping from the locomotive engine of appellant. But, however the engine may have been equipped for arresting sparks, and whether the best known appliances were used for that purpose or not, we think the evidence shows that the engine itself, at the time it set the fire, was out of repair. The testimony of the engineer who was running the engine on the night of the fire, shows that said engine came out of the shops after a

general overhauling, on October 1st. That on October 4th he reported it as not making steam, and that from that date to October 24th, it did not make steam properly for some reason which he could not explain. On the night of the fire, while passing through the village of Waldron and drawing a heavy freight train up grade, the evidence shows the engine was working or laboring so hard as to probably overcome the power of the spark arrester to prevent the fire from escaping. That the sparks did escape and set fire to appellee's premises, is beyond question, and as we have said, is not disputed. It would seem to follow that something was out of order, and not in proper repair, or that the engine was not properly handled. The only evidence as to the competency of the engineer is the testimony of the fireman. He and the engineer each swear to the other's competency, but neither swear that at the time the fire was communicated to appellee's property, the engine was being properly handled. We find no such proof in the record, and in its absence the jury had the right to say that appellee's *prima facie* case was not overcome.

We think there was no error in giving to the jury instruction No. 7, at the instance of appellee.

On the trial of the cause, certain appliances used in locomotives for the purpose of arresting sparks, consisting of a wire netting as used in some engines, and a perforated plate as used in others, were produced by counsel for appellant for the inspection of the jury, and by consent were so inspected, and by like consent were taken by the jury to their room when they retired to consider of their verdict. Appellant, in view of these facts, asked the court to give to the jury the following instruction, viz.:

No. 21. You have been permitted during this trial to view and inspect a screen, or perforated plate, for the purpose of enabling you to better understand the facts of the case, but I now instruct you that you are not to consider any fact observed by you while making such inspection, or any inference which you may have drawn from such inspection, as evidence upon any question in this cause.

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But the court refused to give such instruction, and this is assigned for error.

Under the circumstances named, we think it was not error to refuse the instruction.

We are of the opinion there was no error in allowing testimony as to the value of the house destroyed. There is no complaint either in the assignment of errors, or in the argument of counsel, that the damages are excessive, and even if the evidence were improper, it could have done no harm.

The error, if any existed, in allowing testimony concerning the throwing of sparks by the engine before it went into the shops, was not of so serious a character as to require a reversal of the judgment for that cause alone.

Finding no reversible error in the record, the judgment will be affirmed.

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**Thomas E. Minkler and Mary Ella Minkler v. John
R. Simons, Adm'r, et al.**

1. ADMINISTRATION OF ESTATES—*Jurisdiction of Courts of Equity.*—A court of equity will not take jurisdiction of the administration of estates, except in extraordinary cases, when some special reason is shown to exist why the administration should be withdrawn from the County Court.

2. SAME—*Interference of Equity Held to be Unwarranted Under the Circumstances.*—A will directed the administrator with the will annexed to sell the testator's real estate, and distribute the proceeds among his three children, and a codicil revoked the devise to one of the children, but made no provision for the disposition of his share. A bill was filed asking to have the will and codicil construed and carried into effect. Held, that the County Court had plenary power to construe the will and order a distribution of the proceeds of a sale of the real estate, and that the Circuit Court might review its order on appeal, but that it ought not to entertain a bill in equity in the first instance.

Bill, to construe and execute a will. Appeal from the Circuit Court of Kendall County; the Hon. CLARK W. UPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

Minkler v. Simons.

A. M. BEAUPRE and C. I. McNETT, attorneys for appellants.

SAMUEL J. LUMBARD, attorney for appellees John R. Simons, Adm'r, and Susannah Simons.

The County Court has ample authority not only to construe the will and codicil and order distribution pursuant to their terms, but also to compel the administrator to discharge his duty. "The County Court shall have jurisdiction in all matters of probate, settlements of estates of deceased persons, etc." R. S., Chap. 37, Sec. 118.

It is also well settled that a court of chancery will not, except in extraordinary cases, supersede the Probate Court in the administration of an estate. *Crain v. Kennedy*, 85 Ill. 340; *Heustis v. Johnson*, 84 Ill. 61; *Hales v. Holland*, 92 Ill. 498; *Harding v. Shepard et al.*, 107 Ill. 273.

Courts of equity "will never entertain a suit brought solely for the purpose of interpreting the provisions of a will without further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated. * * * They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy." *Pomeroy's Equity Jurisprudence*, Sec. 1156.

"Where no trust is created, the law, as we understand it, is that neither the executor nor heir, or devisee who claims only a legal title in the estate, will be permitted to come into a court of equity for the purpose of obtaining a judicial construction of the will. Where only purely legal titles are involved and no other relief is asked, equity will not assume jurisdiction to declare such legal titles, but will remit the parties to their remedies at law." *Strubher et al. v. Belsey*, 79 Ill. 308.

J. IVOR MONTGOMERY and P. G. HAWLEY, attorneys for appellees Florence C. Andrews and Charles H. Andrews.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellants filed their bill in equity against appellees, for the purpose of having construed and carried into effect the last will and codicil thereto of Smith G. Minkler, deceased, of whose estate appellee, John R. Simons, is administrator with the will annexed. By agreement of parties the cause was heard by the court below upon bill and answers of all the defendants, without replications or proofs other than the will and codicil. On such hearing the court dismissed the bill for want of equity and the complainants appealed to this court.

Without setting out the various provisions of the will at length, it will be sufficient for our purpose to say, that by the will, deceased devised to his then children, Susannah Simons, Thomas E. Minkler and Florence C. Andrews, all his real estate, subject to the right of his wife to use and enjoy the same during the term of her natural life.

His wife, Sarah Ann Minkler, and one W. W. Winn, were named as executors of the will, with full power to sell and dispose of the real estate, and the same power of sale was conferred upon the surviving executor or administrator with the will annexed, in case the executors named should not make the sale; and the administrator was directed to make such sale as soon as should be consistent with the interests of the estate.

By a codicil to the will, deceased revoked the devise of one-third of the real estate to his son, Thomas E. Minkler, and directed that on the final settlement of the estate said Thomas should receive the sum of \$1,200. No disposition was made of the one-third interest in the real estate previously given to Thomas E. Minkler.

The will and codicil were admitted to probate in the County Court of Kendall County on June 19, 1895, and such further proceedings were had upon the renunciation of persons named as executors, that the said John R. Simons was appointed administrator with the will and codicil annexed of the estate of said Smith G. Minkler, deceased, and he duly qualified and is still acting as such administrator.

The only question sought to be settled by a construction of the codicil, as stated by counsel for appellants, is: "Where a testator by his will devises his real estate to his three children as tenants in common, and afterward, by codicil, revokes the portion devised to one, but makes no new disposition of such portion, whether the portion so revoked is intestate estate, or accrues to the other two children." We do not think the question is properly before this court for determination. In any view we have been able to take of the case, we think the action of the court below in dismissing the bill, was proper, and must be affirmed.

The will, as we have seen, directs the administrator with the will annexed to sell the real estate and distribute the proceeds. This, the administrator says, he has always been willing to do, and is still willing. But even were he unwilling, the power of the County Court is ample to compel the performance of any duty devolved upon him by the will and codicil. No reason is perceived why a court of equity should interfere and take the administration of the estate out of the County Court. The decisions are numerous in this State, in which it has been held that a court of equity will not take jurisdiction of the settlement of estates, except in extraordinary cases, when some special reason is shown to exist, why the administration should be withdrawn from the County Court. *Freeland, Ex'r, etc., v. Dazey et al.*, 25 Ill. 294; *Heustis et al. v. Johnson et al.*, 84 Id. 61; *Crain v. Kennedy et al.*, 85 Id. 340; *Harding v. Shepard et al.*, 107 Id. 264. No such reason appears in this case. When the real estate is sold the Probate Court has plenary power to construe the will and order a distribution of the proceeds. If that court should decide improperly, there is a remedy by appeal to the Circuit Court, but we think that court ought not to entertain jurisdiction by bill in equity in the first instance in cases of this character.

For the reasons given the decree will be affirmed.

N. D. Stevens, Adm'r, v. George Farrell et al.

1. **APPEALS AND ERRORS**—*An Order Held Not to be a Final Order.*—An order overruling a motion to dismiss an appeal is not a final order and can not be appealed from.

2. **SAME**—*Sec. 124, Chap. 3, R. S., Construed.*—The provisions for appeal contained in Sec. 124, Chap. 3, R. S., must be held to mean that appeals shall be allowed from final orders, or orders final in their character, and which make a final determination of the matter in controversy.

Petition, by an administrator for approval of final report and for a discharge. Appeal from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1897. Appeal dismissed. Opinion filed September 20, 1897.

C. P. GARDNER, attorney for appellant.

C. F. PRESTON, attorney for appellees.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellant, as administrator *de bonis non*, with the will annexed, of the estate of Noah W. Davenport, deceased, filed his final report as such administrator, in the County Court of Lee County, to which report appellees filed objections. On August 5, 1895, a full hearing was had upon such objections in the County Court, and an order was entered overruling the objections, approving the report and discharging the administrator. On the same day appellees prayed an appeal to the Circuit Court of said Lee County, which was allowed, and on August 28, 1895, they filed their appeal bond in the County Court, which was approved by the judge thereof, and thereupon the clerk of said County Court transmitted a duly certified transcript of the record in said cause to the Circuit Court. At the January term, 1896, of said Circuit Court, a motion was made by appellant to dismiss the appeal from the County Court on the ground that it was not perfected within twenty days from

Mathews v. Granger.

the date of the order appealed from. The Circuit Court overruled the motion to dismiss, and appellant brings the cause to this court by appeal.

We do not think the order of the Circuit Court was appealable. It was not a final order. No judgment was entered thereon against any one. No final disposition was made of the matters in controversy. The objections to the administrator's report still remained entirely undisposed of. By the statute, appeals and writs of error are allowed to this court only upon the final orders of the courts from whose orders or judgments appeals are allowed. Rev. Stat., Chap. 37, Sec. 25. We think that the provisions for appeal contained in Sec. 124, Chap. 3, which seem to be relied on by appellant, must be held to mean that appeals shall be allowed from final orders, or orders final in their character, and which make a final determination of the matter in controversy.

It would have been proper for appellant to have excepted to the ruling of the Circuit Court, and thus saved the question in the record, and if, upon a final determination of the cause in the Circuit Court, he had been dissatisfied therewith and brought the case here, he might have had a ruling of this court upon the propriety of the Circuit Court's action in refusing to dismiss the appeal. But as the record now stands we think the question is not properly before us, and the appeal to this court must be dismissed.

Phebe Mathews v. Elmer Granger.

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s96	587
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s196s	165

1. **REPLEVIN**—*Condition at Commencement of Suit Controls.*—In a replevin suit the rights of the parties must be determined according to the condition of things as they were at the time the suit was instituted.

2. **SAME**—*A Jury Should not be Allowed to Determine What is a Wrongful Taking.*—In a replevin suit an instruction leaving it to the jury to decide for themselves what was a wrongful taking without informing them what would be such wrongful taking, is improper and should not be given.

3. CHATTEL MORTGAGES—*Proof of Oral Permission to Use Certain Property Held Admissible.*—In a replevin suit by a mortgagor against a mortgagee, to recover property taken under the mortgage, it was held that under the circumstances of the case the mortgagor might prove an oral permission to use a portion of certain oats covered by the mortgage, to be replaced by others, as this would be nothing more than a mere loan or exchange and would not in any way violate or change the terms of the mortgage.

4. INSTRUCTIONS—*A Clerical Error in, Held Ground for Reversal Under the Circumstances.*—The court holds that while the use of the word defendant instead of plaintiff in certain instructions in this case was clearly a clerical error, that it can not be said with certainty that the jury were not misled, and that under the circumstances, the giving of such instructions was error justifying a reversal of the judgment.

Replevin, by a mortgagor against a mortgagee. Appeal from the Circuit Court of Mercer County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

J. H. CONNELL and J. A. McKENZIE, attorneys for appellant.

J. M. WILSON and BROOK & GRAHAM, attorneys for appellee; W. J. GRAHAM, of counsel.

MR. PRESIDING JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee brought an action of replevin in the Circuit Court, to recover the possession of certain farm products, as well as a horse and heifer, which had been taken from him by appellant under a chattel mortgage executed to her by appellee.

The case was before us on a former appeal, and was then reversed for erroneous instructions given by the court. The facts of the case sufficiently appear in our former opinion (66 Ill. App. 121) and it is unnecessary to here repeat them. The only material difference in the evidence appearing on the last trial from that on the former one, is, that there is now some testimony in the record as to oral permission having been given to appellee, by appellant, to use a portion of the oats in controversy; and it also appears that all rent

due appellant has been fully paid since the commencement of this suit. So far as the last point is concerned, it is only to be remarked that the rights of the parties must be determined according to the condition of things as they were at the time the suit was instituted.

On the last trial the jury returned a verdict against appellant, and as we think, against the evidence and the instructions of the court. When the case was here before, we were of the opinion the evidence showed a sufficient justification to appellant to take the property under her chattel mortgage. We see no reason for changing our opinion as the record now stands. Unless the appellee can prove by a preponderance of the evidence that he had permission from appellant to use the oats, she certainly was justified in foreclosing her chattel mortgage. We do not think appellee must necessarily prove that such permission was given in writing, although the court so instructed the jury. If this were the law, then clearly the verdict should have been set aside, for there was no pretense that any permission was given in writing. But, under the circumstances of the case, we think it would be sufficient for appellee to prove an oral permission to use a portion of the oats, to be replaced by others, as this would be nothing more than a mere loan or exchange, and would not in any way violate or change the terms of the mortgage. The testimony upon this question of permission, however, is squarely contradicted by appellant, and while that was a question for the jury, yet there was some confusion in the instructions which may have misled the jury and caused them to come to a wrong conclusion. For instance, the second and third instructions given for plaintiff below, told the jury, in substance, that before the defendant had the right to take the property in question under her chattel mortgage, she must show by a preponderance of the evidence that some one or more of the conditions of the mortgage "was violated by the defendant." This was no doubt a clerical error in drawing the instructions. The court and counsel readily understood what was intended, and the objection may seem technical, but we can

not say the jury were not misled. They would naturally understand the instructions to mean what they said, and if so, they would surely be led into error. No argument can justify these instructions, and they should not have been given. Counsel for appellee do not defend them, and in fact, say nothing about them; nothing that could be said would avail to do away with their injurious character and probable effect.

The first instruction given for plaintiff was erroneous in leaving it to the jury to decide for themselves what was a wrongful taking, without informing them what would be such wrongful taking. The instruction was as follows:

"You are instructed that this is an action of replevin brought by the plaintiff, Elmer Granger, against the defendant, Phebe Mathews, to recover the possession of the property described in the affidavit, writ and declaration. The plaintiff claims he was in the lawful possession of the property, and that the defendant wrongfully took and unjustly detained the same. And the court instructs you that to entitle the plaintiff to recover in this action, it is only necessary for him to show that the property was taken wrongfully from his possession by the defendant or by some one acting for her, and if you believe from a preponderance of the evidence that it was so taken, you will find the defendant guilty."

Under this instruction the jury would have the right to judge for themselves what was a wrongful taking, and inasmuch as there was no question about the fact that appellant had taken the property in dispute, the jury might, without enlightenment as to what constituted a wrongful taking, suppose that this action of appellant's amounted thereto.

We are of the opinion the case should be submitted to another jury to be tried upon correct principles and under instructions free from the errors indicated. The judgment will therefore be reversed and the cause remanded.

Hallock v. Cutler.

D. Y. Hallock et al. v. A. E. Cutler.

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108 1 79

1. **WARRANTIES—When Implied.**—One who manufactures an implement, names it a potato digger, and sells it to another, impliedly warrants that it will dig potatoes and place them on top of the ground ready to be picked up.

2. **EVIDENCE—Exclusion of, Not Ground for Reversal, When Fact is Shown by Other Evidence.**—A judgment which does substantial justice will not be reversed on account of the exclusion of a letter, when all that it would have proved is fully shown by other evidence which was admitted.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Winnebago County; the Hon. J. C. GARVER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

WORKS & HYER, attorneys for appellants.

In support of the proposition that there was no implied warranty of the machines in question, which could properly be brought into this case, and that the rule of *caveat emptor* applies, appellants' attorneys cited the following: Titley et al. v. The Enterprise Stone Co., 127 Ill. 457; Benjamin on Sales, Sec. 987; Cosgrove v. Burnett (Minn.), 20 N. W. Rep. 359; Goulds et al. v. Brophy (Minn.), 43 N. W. Rep. 834; Dounce v. Dow, 64 N. Y. 411; James v. Bocage, 45 Ark. 284; 2 Sutherland on Damages, 409.

"If an order be given for a specified article of a recognized kind or description, and the article is supplied, there is no warranty that it will answer the purpose described or supposed although intended and supposed to do so." Wisconsin Red Pressed Brick Co. v. Hood et al. (Minn.), 56 N. W. Rep. 165. See also Wisconsin Red Pressed Brick Co. v. Hurd Refrigerator Co. et al. (Minn.), 62 N. W. Rep. 550; and Chanter v. Hopkins, 4 M. & W. 399.

FROST & McEVOR, attorneys for appellee.

It is implied in the sale of manufactured goods that

they shall be reasonably fit for some purpose. *Laing v. Fidgeon*, 6 Taunt. 108.

If a commodity be sold for a particular purpose, there is an implied warranty that it is reasonably fit for that purpose. *Gray v. Cox*, 4 Barn. & Cress. 108.

See also *Bluett v. Osborne*, 1 Starkie, 384, and *Jones v. Bright*, 5 Bing. 533.

There is an implied warranty where the vendor is told that the article ordered is required for a particular purpose that it shall answer that purpose. *Brown v. Edgington*, 2 Sco. N. R. 496; *Bigge v. Parkinson*, 7 H. & N. 955.

When a vendor manufactures an article to be used for a particular purpose a sale implies a warranty that it is reasonably fit and proper for the purpose for which he proposes to make it and for which it is known to be required. *Jones v. Bright*, 5 Bing. 533; 3 Moore & P. 155; *Gray v. Cox*, 6 D. and R. 208; 4 Barn. & Cress. 108; *Bigge v. Parkinson* 31 L. J. N. S. C. L. 301; 7 H. and N. 955.

Where goods are ordered for a particular purpose known to the seller, he impliedly undertakes that they shall be reasonably fit for the purpose for which they are ordered, and especially is this so if the seller is also a manufacturer of the goods ordered. *Gerst v. Jones*, 32 Gratt. (Va.), 518; 10 Cen. Law Journal, 151.

A manufacturer who sells a steam boiler impliedly warrants that it is made of sound material and is of good workmanship. *Beers v. Williams*, 16 Ill. 69; *Rogers v. Niles*, 11 Ohio St. 48.

If a thing be ordered of a manufacturer for a special purpose, and it is accepted and sold for that purpose, there is an implied warranty that it is fit for that purpose. 1 Parsons on Contracts, 586 and 587.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Appellants were manufacturers at York, Pennsylvania, of a farm implement called a potato digger. Appellee was a dealer in agricultural implements at Rockford, Illinois. Appellee ordered one potato digger of appellants and

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received it about June 1, 1894. Then he ordered three more. He tried them in dry soil and they seemed to work well. He paid for these four. About the last of August, 1894, he ordered twelve more, which were received by him. He afterward claimed they were unmerchantable and not fit for the purpose for which they were designed, and refused to pay for them, and offered to return them to appellants. Appellants then brought this suit to recover the price of said twelve potato diggers, which was \$75. In the Circuit Court appellants had verdict and judgment for \$37.50, from which judgment in their favor they prosecute this appeal.

There was no express warranty in the sale of these implements. There was therefore an implied warranty. The main controversy is as to the extent of such implied warranty. Appellants claim it was only as to material and workmanship. Appellee claims that as appellants were the manufacturers of the implements designated, and named them "potato diggers," there was an implied warranty that they were reasonably fit and proper for the use indicated, that is, for digging potatoes. The Circuit Court, in its rulings upon the evidence and instructions, took the latter view. In *Beers v. Williams*, 16 Ill. 69, it was held that upon the sale of a boiler by the manufacturer there was an implied warranty that it was fit for a boiler. In *Archdale v. Moore*, 19 Ill. 565, the court said: "Where the seller is the manufacturer the law implies a warranty that it is reasonably fit for the use for which it is intended." 1 *Parsons on Contracts*, star page 469, states this rule, or rather exception to the general rule, thus: "If a thing be ordered of a manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose." In a long note the author reviews the cases. In *Brenton v. Davis*, 8 Blackf. 317, the court said: "If a manufacturer of an article sells it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose; and if, owing to some defect in the article not

visible to the purchaser, it is unfit for the purpose for which it is sold and bought, the seller is liable on his implied warranty." 2 Benjamin on Sales, Section 988. We are aware that the case at bar comes very close to the line of the converse of the above proposition, being the position contended for by appellant, and which is thus stated in 2 Benjamin on Sales, Section 987: "Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer." We, however, think the Circuit Court correctly held the law as applied to this case. Appellee had received four of these potato diggers, the first nearly three months before the order for the dozen was given, but at a season of the year when such implements are but little used. He had tried them in dry ground. The evidence seems to show very strongly, and without contradiction, that when applied to the conditions usually existing at the time of potato digging these implements would not work. The very name "potato digger" implies that it is an implement calculated and intended to take potatoes out of the ground and leave them on top of the soil. The evidence is all one way that these machines would not do this, but only shoved the soil and potatoes to each side, leaving the potatoes still in the soil. A common plow would do the same thing. This implement, according to the evidence, was of no aid in digging potatoes, and it is not shown to have been fit for any other use. We hold that one who manufactures an implement, names it a potato digger, and sells it to another, impliedly warrants that it will dig potatoes and place them on top of the ground, ready to be picked up. If we are right in this conclusion, the principal rulings of the Circuit Court were correct.

It is argued the court below should have admitted the letter of May 1, 1894, written by appellee to appellants. All it would have proved was that appellee ordered and received one potato digger from appellants, but the facts on

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that subject were fully disclosed by appellee when called by appellants as their only witness. It is also urged the verdict of \$37.50 can not stand, because if appellee is right there should have been no recovery. While appellee testified that none of these twelve implements received were ever sold "only as they came back," and that he notified appellants they were all on hand subject to their order, yet he also testified that he did not know how many of the diggers he had left in his warehouse, and that of the twelve implements in controversy he had sold "in the neighborhood of three" that were not brought back; and that there were "perhaps four or five altogether—that is, what you would call a sale," explaining that where the parties brought them back he did not consider that was a sale. His offer to return could not extend to diggers which he had sold and which had not been returned to him. The jury charged him with six implements at the contract price, and we think substantial justice was done. Judgment affirmed.

John E. Lauder v. Peoria Agricultural and Trotting Society.

71	476
78	663
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e100	68

1. CORPORATIONS—*Extent of Power to Purchase Land.*—The statute implies that a corporation which requires a tract of land for its legitimate purposes may in good faith buy a tract larger than subsequent events shall prove was needed, and in such case the transaction will not be *ultra vires*, nor the corporation precluded from selling the surplus.

2. SAME—*Ultra Vires—Estoppel.*—A person who has received the benefits of a full performance, by a corporation, of a contract between himself and the corporation, will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

3. SAME—*The State Alone Can Object that a Corporation is Holding Land Unlawfully.*—No one except the State can be heard to say that a corporation, which has power to hold real estate, has exceeded its powers by acquiring real estate beyond its need or for other than corporate purposes.

4. CONTRACTS—*Date of, Not Conclusive as to Time of Execution.*—It may be assumed that an instrument was executed, delivered and became

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binding, if at all, on the day of its date, where nothing to the contrary appears, but the date is not conclusive upon the subject.

5. *SAME—An Instrument Held to be a Proposal and Binding After Acceptance.*—A person signed an instrument in which he agreed, on certain conditions, to purchase certain land of a corporation not in existence at the time the instrument was signed. *Held*, that the agreement was in the nature of a proposition to the corporation, and became binding upon the corporation accepting it, and either signing it or performing the contract on its part.

6. *REAL ESTATE—A Description Held Sufficient.*—A contract of sale of real estate was as follows: "The undersigned hereby agrees to purchase * * * one lot in a subdivision to be made of a part of the north-east quarter of section twenty-eight (28), township nine (9) north, range eight (8), east of the fourth principal meridian, to be known as the Fair Ground subdivision, as shown on a plat thereof in the custody of John B. Samuels, trustee, and lying east of the fair ground and race track hereinafter referred to. Said lot * * * to be designated by a majority of the persons comprising the citizens' committee on fair ground, with mile race track. Dated at Peoria, Illinois. * * *" *Held*, that the contract was not void for want of a sufficient description of the property.

7. *LOTTERIES—A Transaction Held Not to be a Lottery.*—A contract of sale of a lot in a certain tract, provided that the lot should "be designated by a majority of the persons comprising the citizens' committee on fair ground with mile race track." In a suit for the purchase price of the lot it was shown that all the lots in the tract were of substantially equal value. *Held*, that the transaction was not shown to be a lottery.

8. *APPELLATE COURT PRACTICE—Errors Not Argued are Waived.*—While the record in this case appears to contain errors, such apparent errors were not argued and must be considered waived.

Assumpsit, for the purchase price of a lot. Appeal from the County Court of Peoria County; the Hon. ROBERT H. LOVETT, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

ARTHUR KEITHLEY, attorney for appellant.

IRWIN & SLEMMONS, attorneys for appellee.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

This was an action of *assumpsit* brought by appellee against appellant to recover the price he agreed in writing to pay for a lot of land. A jury was waived. It was agreed the declaration and plea were sufficient to admit any proof

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offered by either party. The evidence consisted of a written contract and various stipulations entered into at the trial. There was finding and judgment for appellee in the sum of \$272.51, from which appellant prosecutes this appeal.

The contract sued upon was dated March 23, 1895, and signed by appellant, and the body thereof was as follows: "The undersigned, John E. Lauder, hereby agrees to purchase from the Peoria Agricultural and Trotting Society, and said society hereby agrees to sell him, one lot in a subdivision to be made of a part of the northeast quarter of section twenty-eight (28), township nine (9) north, range eight (8), east of the fourth principal meridian, to be known as the Fair Ground subdivision, as shown on a plat thereof in the custody of John B. Samuels, trustee, and lying east of the fair ground and race track hereinafter referred to, at two hundred and fifty dollars per lot, payable one hundred dollars in cash to John B. Samuels, trustee, on delivery of a warranty deed, conveying in fee simple, a good title, free of all incumbrances, and the balance in monthly payments of twenty-five dollars each, with interest at six per cent per annum, evidenced by six promissory notes, payable to John B. Samuels, as trustee for said society, or order, and to be secured by mortgage on said lot or lots. Said lot or lots to be designated by a majority of the persons comprising the citizens' committee on fair grounds with mile race track, whenever a sufficient number of lots in said subdivision have been sold to warrant said society in locating a fair ground with mile race track, on what is known as the Allaire farm and necessary adjacent land. And should said society fail or refuse to locate and construct said fair ground and mile race track, this agreement to be null and void." When it was offered in evidence appellant admitted its execution, but objected to its competency as evidence on the following grounds: 1st. That the contract was *ultra vires*. 2d. That there was no such corporation as plaintiff in existence at the date of the contract. 3d. That the contract is void for the want of a sufficient description of the property sold. 4th. That the transac

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tion was a lottery, and therefore void. These objections were overruled, and they present the questions argued upon this record. It was stipulated appellee was an Illinois corporation, having its principal office at Peoria; that its certificate of organization was dated April 24, 1895, and was filed for record May 20, 1895, in the recorder's office of Peoria county; that its corporate object as stated in said certificate was to construct and maintain a race track; to hold race meetings; to develop speed of persons on bicycles; to improve and develop agricultural, horticultural and mechanical arts, and hold exhibitions thereof, etc. It was also stipulated that appellee did and performed all matters and things upon its part to be done and performed, in the manner and as required by said contract; that the several lots of the subdivision mentioned in said contract were all of substantially equal value, and that said lot was designated and allotted to appellant in writing.

We are unable to say that the foregoing evidence shows this contract was beyond the powers of the corporation. The purposes of the corporation required it to have real estate. This suit was brought August 1, 1896, long after the organization of appellee. Section 1 of the act under which it is organized, forbids corporations to be formed thereunder for the purpose of real estate brokerage, but section 5 of said act authorizes appellee to own so much real estate as may be necessary for the transaction of its business, and to sell and dispose of the same when not required for its uses. The evidence does not disclose what lands were necessary for appellee's corporate purposes, nor what lands it bought, nor whether the lot in question ceased to be required for its corporate purposes. The statute implies a corporation which requires a tract of land for its legitimate purposes, may in good faith buy a tract larger than subsequent events shall prove was needed, and in such case the transaction would not be *ultra vires*, nor the corporation precluded from selling the surplus. Counsel have stated in their briefs supposed facts concerning the purchase and use of this land which we do not find in the

evidence. The contract required appellee to deliver appellant a warranty deed of the lot designated. The stipulation admits a lot was designated for appellant, and that the corporation delivered a warranty deed of said lot to appellant. This means more than a mere tender of a deed. Delivery is defined in Bouvier as "transmitting the possession of a thing from one person into the power or possession of another." This stipulation we therefore construe to mean that before this suit was brought the corporation acquired title to this lot and caused it to be set apart to appellant in the manner provided by the contract; that the corporation executed a warranty deed conveying said lot to appellant in fee, and offered it to appellant; and that he received it into his possession. By this act the contract became completely executed by the corporation, and appellant had received the full benefit thereof, and we are of opinion he could not thereafter plead *ultra vires* to avoid paying for what he had received. The law governing the rights of the parties in such case is thus well stated in 27 American and English Encyclopedia of Law, 363, under the title "*ultra vires*:" "The distinction taken between *ultra vires* contracts purely executory and those fully executed on one side, is founded in reason. When the contract has been fully performed by one of the parties, the infraction of the law has already taken place, which eliminates all questions of public policy from the case, and allows the courts to deal with the contract on equitable principles. Furthermore, the only justification for the plea of *ultra vires* by an individual sued upon a contract with a corporation is that the obligation is not mutual, as the other party, the corporation, would not be bound by it. But when the contract has been fully performed by the corporation, the mutuality of the obligation becomes an immaterial question, for the reason that the other party can have no occasion to seek its enforcement. According to the weight of authority, a corporation may not avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the perform-

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ance of the contract; and, conversely, if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation." *Heims Brewing Company v. Flannery*, 137 Ill. 309; *Bradley v. Ballard*, 55 Ill. 413. Moreover, the State is the only party which can be heard to say appellee has exceeded its powers by acquiring real estate beyond its need or for other than corporate purposes. *Hough v. Cook County Land Co.*, 73 Ill. 23; *Alexander v. Tolleston Club*, 110 Ill. 65; *Barnes v. Suddard*, 117 Ill. 237.

Appellant urges this contract is invalid because appellee was not in being at its date. The date of the instrument may be assumed to be the time when it was executed and delivered and became binding where nothing to the contrary appears, but such date is not conclusive upon that subject. Appellee offered the contract in evidence. The contract therefore came into its possession at some time after its organization was completed, so that it could do business and enter into contracts. No matter when it was dated and signed by appellant, it could not have been delivered to appellee till appellee's organization was complete. As the contract was signed by appellant alone it was in the nature of a proposition to the corporation, and could become a binding contract by appellee accepting it, and either signing it or performing the contract on its part. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 246; *Whitney v. Wyman*, 101 U. S. 392; *Stanton v. New York & E. Ry. Co.*, 59 Conn. 272; *Bettelle v. Northwestern Cement Co.*, 37 Minn. 89. Appellee did not sign the contract but acquired title to the realty described therein, subdivided it, caused a lot to be designated in writing for appellant, and executed and delivered to him a deed therefor, all in compliance with the contract, and sued him for the purchase price. This sufficiently shows that after appellee became a corporation the contract was delivered to it, and accepted and performed by it.

It is said the contract is void for want of a sufficient

description of the property agreed to be sold. The quarter-section, township, range and meridian are specifically described. The instrument shows that the corporation when it became incorporated was to make a subdivision of a part of said quarter-section, to be known as the "Fair Ground Subdivision;" that a plat thereof had already been prepared and was in the custody of John B. Samuels, trustee. Appellant was to have a lot in said subdivision so already platted. A majority of the persons, comprising the citizens' committee on fair ground, was to designate appellant's lot out of said subdivision, and all the lots in said subdivision were of equal value. Appellant was to have some one of the lots so platted. The contract did not give the number of his lot, but that is certain which can be made certain, and the contract designated the agency to be used in selecting the lot. We think the contract was not void for want of a sufficient description of the property.

As all the lots were of equal value the transaction is not shown to be a lottery. The real substance of the transaction probably was a subscription to appellee for its corporate purposes.

The promise was to pay John B. Samuels, trustee. The record does not disclose why suit was brought in the name of appellee. One hundred dollars was to be paid in cash on the delivery of the deed, and the balance in monthly payments of \$25 each, with interest at six per cent per annum, evidenced by six promissory notes, payable to John B. Samuels, trustee, and secured by mortgage on said lot. The evidence does not show that appellant refused to execute these notes and give this mortgage, and therefore does not show why more than \$100 should have been recovered in this suit. Appellee recovered all the payments and \$22.51 interest on the purchase price. Interest would not begin to run thereon till the deed was tendered, and the date when the deed was tendered and delivered is not in evidence, so that the proof does not show any basis for computing interest before the suit was begun. The suit was commenced August 1, 1896, and judgment rendered November 4, 1896, so that no

such amount of interest accrued after the suit was brought. But as these apparent errors were not argued they are waived. The judgment of the court below was not erroneous in the respects suggested in argument, and it is therefore affirmed.

Robert A. Rodesch v. Julius J. Estey et al.

1. **PLEADING—Order of.**—The statement of the plaintiff's cause of action must precede the statement of the defendant's defense to such cause of action, and no plea or notice of set-off under it can properly be filed by a defendant prior to the filing of the declaration, and if filed, should be stricken.

2. **SAME—Notice of Set-off.**—The statute giving a defendant the right to give notice of set-off instead of pleading the same, only allows such notice "under the general issue or under the plea of payment," and where there is no plea of payment, and the general issue having been improperly pleaded is stricken from the files, there is nothing to support the notice and it may also be stricken.

3. **SAME—Plaintiff Can Not be Compelled to File Declaration.**—There is no authorized practice by which a plaintiff can be forced to file a declaration if he chooses to abandon his case. A court of law has no jurisdiction to grant specific performance of a contract to institute and prosecute a suit to trial.

4. **SAME—Notice of Set-off Does Not Amount to a Plea.**—It may be that if defendant had filed a plea of set-off, it would have been within the power of the court to compel an issue to be made on such plea and to give a trial thereunder, though no declaration in the original action had been filed; but the notice filed in this case was not in any respect a plea of set-off, and the court is not called upon to decide what authority the trial court would have had if such a plea had been filed.

Assumpsit.—Appeal from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

J. F. SANFORD, attorney for appellant.

Where the plaintiff acts in bad faith in the progress of the trial, non-suit will be denied. *Wilder v. Boynton*, 63 Barb. (N. Y.) 547.

Plaintiff can not dismiss his suit when it may prejudice

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the rights of the defendant. Ency. of Pl. and Pr., Vol. 6, 843.

Where the discontinuance would be inequitable it may be denied altogether. Ency. of Pl. and Pr., Vol. 6, 870.

Wherever the defendant would lose his remedy the discontinuance will be denied. Ency. of Pl. and Pr., Vol. 6, 871, note.

So an order discontinuing the suit has been refused, where a counter-claim has been set up against which the statute of limitation would be a bar if the suit were discontinued. Ency. of Pl. and Pr., Vol. 6, 871, note; *Van Alen v. Schermerhorn*, 14 How. Pr. 287; *Bradford v. Andrews*, 20 Ohio St. 221.

Even where the discontinuance is allowed by statute, the plaintiff can not bring in and dismiss or discontinue parties wholly at his own discretion. Ency. of Pl. and Pr., Vol. 6, 861.

The provision in the statute that after a plea of set-off has been filed the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant or leave of court, implies that leave of court is not to be given to dismiss except for cause shown. *City of East St. Louis v. Thomas*, 102 Ill. 453.

Filing of the plea of set-off was tantamount to the institution of a cross-action by the appellant against the appellees which should not have been dismissed without his consent. *Litch v. Clinch et al.*, 136 Ill. 410; *Bennett v. Puliam*, 3 Ill. App. 185; *Am. and Eng. Ency. of Law*, Vol. 22, 335.

And in effect became a declaration. *Breen v. Sullivan*, 5 Ill. App. 449.

Defendant who has filed cross-claim is now considered a plaintiff. Ency. of Pl. and Pr., Vol. 6, 848.

DIXON & BETHEA, attorneys for appellees.

Before declaration was filed or required to be, appellants filed a notice of set-off. On motion the notice of set-off was stricken from the files. This action of the court was

not error. When the notice was filed there was nothing on file to which it could apply. *Bailey v. Valley Nat. Bank*, 127 Ill. 332.

At the time of giving notice, appellees had not filed their declaration. No plea or notice under it could be filed prior to the filing of the declaration. *Bailey v. Valley Nat. Bank*, 21 Ill. App. 642.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

On May 11, 1895, *Estey & Camp*, appellees herein, brought this action of assumpsit against *Robert A. Rodesch* in the court below, by suing out a summons returnable on the third Monday of September following, which writ was served on May 18th. Plaintiffs never filed a declaration. On the first day of the return term, defendant filed a plea of general issue, and attached thereto a notice of set-off. Plaintiff moved to strike said plea and notice from the files, which motion was granted. Afterward defendant moved for a rule on plaintiffs to file a declaration. Said motion was heard January 11, 1897, upon affidavits, and denied. Defendant then moved for leave to refile his plea of general issue and notice of set-off, which motion was denied. The next day the court entered an order reciting that it was then the fifth term of court since the commencement of the suit, and directing plaintiffs to file their declaration instanter. They did not comply. Thereupon the court dismissed the suit for want of a declaration and for want of prosecution, and rendered judgment against plaintiffs for costs. From said judgment in his favor defendant prosecutes this appeal, and assigns for error that the court below erred: 1st. In striking defendant's plea and notice of set-off from the files; 2d. In overruling defendant's motion for rule on plaintiffs to file a declaration. 3d. In refusing to permit defendant to refile the general issue and notice of set-off. 4th. In dismissing the suit.

Although the court did on January 11, 1897, deny defendant's motion for a rule on plaintiffs to file a declaration, yet the next day it ruled plaintiffs to file a declaration instanter,

which was, in effect, granting defendant's motion, so that the second error is not well assigned.

In the established and logical order of pleading the statement of plaintiff's cause of action upon which he brings his suit must precede the statement of the defendant's defense to such cause of action. 1 Chitty's Pleading, star page 239. This court held in *Bailey v. Valley National Bank*, 21 Ill. App. 642, that no plea or notice of set-off under it could be filed by a defendant prior to the filing of a declaration. This was affirmed in *S. C.*, 127 Ill. 332, the court there saying that when notice of set-off in that case was filed there was nothing on file to which it could apply. The plea of general issue in the case at bar is that defendant "did not promise in manner and form as plaintiffs have thereof above complained against him." The language of the plea shows how out of place it was. Plaintiffs, not having filed a declaration, had not yet complained against him. He could not answer till something was alleged. The plea therefore was properly stricken from the files. The statute giving a defendant the right to give notice of set-off instead of pleading the same (*R. S.*, 1874, C. 110, Sec. 29) limits the right to give such notice "under the general issue or under the plea of payment." There was no plea of payment, and when the general issue was stricken from the files there was nothing to support the notice. The right to give notice of set-off under the general issue means under the general issue properly pleaded. The general issue having been improperly pleaded and stricken from the files, the case should be treated as if the notice had been filed without any plea, and the statute gives no right to file notice of set-off unaccompanied by any plea. Having been filed without right it was properly stricken from the files. For like reasons the court did not err in refusing to permit said plea of general issue and notice of set-off to be refiled, for there was still no declaration to which said general issue could apply.

What power has a court over a plaintiff if he fails or refuses to file a declaration within the time fixed by law? The statute (*R. S.*, 1874, C. 110, Sec. 17) says, in such cases

defendant shall be entitled to a judgment as in the case of a non-suit. The court below gave defendant such a judgment. It is not contended it could have proceeded against plaintiffs or their attorneys for contempt in failing to file a declaration. It was not asked to do so. We know of no authorized practice by which plaintiffs can be forced to file a declaration if they choose to abandon their case.

The special facts relied upon in this case by defendant as a reason for compelling plaintiffs to file a declaration were these: Before this suit was begun plaintiffs had sued defendant before a justice of the peace, and the defendant had interposed a set-off, and the suit was by agreement continued from time to time. Plaintiffs' attorney then suggested to defendant's attorney that the suit would no doubt be appealed to the Circuit Court, however decided, and he proposed that it be dismissed and a suit brought in the Circuit Court to save expense to plaintiffs, who were non-residents of the county. Defendant's attorney claims he agreed said suit then pending might be so dismissed if said attorneys of plaintiffs would bring suit in the Circuit Court, so that the claims of said parties could be fully tried. This suit was then begun, and before service of process therein the justice of the peace dismissed the suit before him upon call, neither party appearing. Defendant's attorney urges that he relied upon the good faith of plaintiffs' attorney. Between the time said suit before the justice of the peace was dismissed and the time defendant asked for a rule on plaintiffs to file a declaration in this case, the statute of limitations had run against most of the items of the off-set claimed by defendant. Defendant's attorney insisted it was a fraud upon his client for plaintiffs not to file a declaration. Plaintiffs' attorney in reply showed that he made the arrangement and brought the second suit in good faith, intending to prosecute it, but that before the return of the writ his clients notified him that they had ascertained judgment against defendant would be of no value, and that they had lost the note upon which in part the suit was based, and that it would be quite expensive to take depositions of

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witnesses to prove its contents, and they directed their attorney to proceed no further with the suit.

It may be, if defendant had filed a plea of set-off (which is in legal form and effect a declaration in a cross-action, *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84; *Ellis v. Cothran*, 117 Ill. 458; 1 *Chitty's Pleading*, star pages 568, 573, 575), it would have been within the power of the court to entertain such cross-action, compel an issue to be made up under said plea, and give a trial thereunder, though no declaration in the original action had been filed. If such power existed, the facts here set up would have required the court below, in the exercise of a sound judicial discretion, to pursue that course and to refuse to dismiss the cause. But the notice filed was not in any respect a plea of set-off; it had no commencement or conclusion such as is requisite in pleading at common law; no issue at common law could have been framed upon it; and we are not called upon to decide what authority the court would have had if such plea had been filed. If defendant wished to raise this question, he should have filed a plea of set-off. Certainly the court below in this case had no jurisdiction to grant specific performance of a contract to sue him and prosecute the suit to a trial, if such was the legal effect of the arrangement made.

For the reasons stated, the judgment of the court below will be affirmed.

George L. Dearth v. Jackson Bute et al., Trustees, etc.

1. *APPEALS AND ERRORS—What Necessary to Perfect an Appeal—Who May Assign Errors.*—A person who has neither prayed an appeal nor signed an appeal bond, has not appealed, and one who has not appealed can not assign errors upon the record.

2. *SAME—Where No Errors are Assigned.*—To make an appeal effective, errors should be assigned, and where an appellant does not assign errors, the appeal presents no question for the consideration of a court of appeal.

3. *SAME—Effect of Filing Brief, When the Appeal is Irregular.*—

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Where appellees file briefs the court may treat the case as pending, upon a writ of error sued out by the party assigning error, and may disregard the irregularity of an attempted appeal.

4. *SAME—Exceptions by One Party do Not Inure to the Benefit of Other Parties.*—One of the parties to a probate proceeding can not have the benefit, on appeal, of exceptions taken by another party.

5. *ADMINISTRATION OF ESTATES—An Administrator Can Not Attack the Acts of the Deceased.*—An administrator takes the estate as he finds it; he stands in the shoes of the deceased, and whatever would bind the property in the hands of the deceased, binds it in the hands of the administrator, who can not attack the acts of the deceased as fraudulent as to creditors.

Petition in Probate.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

SNOW & HINEBAUGH and McGLASSON & BETTLER, attorneys for appellant.

WIDMER & WIDMER, attorneys for appellees.

An administrator takes the title to the personal property of his intestate only as it was held by the intestate at his death, and subject to all liens, trusts, burdens, charges or rights which the intestate imposed upon it in favor of others. The law vests in the administrator no greater rights or better title than the intestate had. Like assignees of bankrupts and insolvents, he takes as a volunteer, and therefore *cum onere*. Choteau v. Jones, 11 Ill. 319; Griffin v. Wertz, 2 Ill. App. 487; Hardin v. Osborne, 94 Ill. 574; Sumner v. McKee, 89 Ill. 127; Kirksey v. Means, 42 Ala. 426; Read v. Gaillard, 2 Desaus. Eq. 552; Sullivan v. Tuck, 1 Md. Ch. Dec. 59.

“An administrator is not the agent or trustee of creditors for the purpose of avoiding a fraudulent conveyance. He is the representative of the intestate, and succeeds to his rights and interests. He stands in his place and is bound by his acts. Whatever is binding on the intestate is binding on his administrator. He is clothed with no greater power than his intestate possessed.” Choteau v. Jones, 11 Ill. 319.

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MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

George L. Dearth, administrator of the estate of Richard J. Hornick, deceased, began this proceeding July 6, 1896, by filing a petition in the Probate Court of La Salle County against the appellees here, who are trustees for the creditors of the firm of R. J. Hornick & Co., under a composition agreement. The petition sought to compel said trustees to surrender certain notes and accounts to the administrator under Section 81 of the Administration Act. Upon a hearing in the Probate Court, an order was entered finding against the trustees as to certain notes and accounts, and ordering them transferred to the administrator, which order the trustees obeyed. But the court found for the trustees as to a note for the principal sum of \$6,325.23, dated June 26, 1896, due four months after date, payable to said trustees as such, and signed by Frank K. Hook and others, and as to said note the Probate Court dismissed the petition of the administrator. An appeal to the Circuit Court from the said order as to said last described note was assumed to have been taken and perfected; the case was tried there *de novo* as to said last described note, and a like order was there entered. An effort was made to appeal therefrom, and a record of said proceedings has been filed here, and errors assigned upon said record.

The administrator did not pray an appeal, and did not sign an appeal bond. John M. Poundstone, a claimant against the estate, filed an appeal bond, executed by himself and a surety, in which he correctly recited that he had prayed for and obtained an appeal to be prosecuted in the name of the said George L. Dearth, administrator. Poundstone has not assigned errors. The assignment of errors is by the administrator alone. This attempt to appeal seems to have been made under section 70 of the Practice Act. Of this section our Supreme Court in *Hammond v. The People*, 164 Ill. 455, said: "This section and the practice recognized allow one party to use the names of all as plaintiffs in suing out a writ of error, but the right 'to use the names of all said persons, if necessary,' does not in the opinion of the court enable

one party to appeal in behalf of all. Each appellant must for himself file bond, or there must be a joint appeal and bond, or a several appeal by the appellants." *Hileman v. Beale*, 115 Ill. 355. As the administrator neither prayed an appeal nor signed an appeal bond he has not appealed; as he did not appeal, he can not assign errors as appellant upon the record. Ordinarily only a party to the suit can appeal. *Steger v. Steger*, 165 Ill. 579. Poundstone is not in any proper sense a party to this proceeding. The administrator was the sole petitioner, and the trustees in the composition agreement were the sole defendants named in said petition. No amendment was ever made or requested bringing any one else into the case. The administrator as a precaution did notify the claimants of the proceeding. The claimants could assist the administrator, but the suit was solely in his name. No doubt claimants could have filed such a petition in the Probate Court, and the petition of the administrator could have been amended so as to make them co-petitioners. *John A. Tolman Company and McNeil & Higgins Company*, claimants, did file such a petition in the Probate Court after the petition of the administrator was filed. But nothing seems to have been done under the petition of said claimants, and neither of them attempted to appeal from either the Probate or the Circuit Court. If Poundstone, as a person aggrieved by the order of the Circuit Court, was entitled to appeal therefrom under section 124 of the administration act, still to make that appeal effective he should have assigned errors. Where the appellant does not assign errors the appeal presents no question for our consideration. *Lancaster v. Waukegan & S. W. Ry. Co.*, 132 Ill. 492; *Davis v. Lang*, 153 Ill. 175.

But appellees have filed briefs. In such case the court may treat the cause as if pending upon a writ of error sued out by the party assigning errors, and may disregard the irregularity of the attempted appeal. *French v. The People*, 77 Ill. 531; *De Beukelaer v. The People*, 25 Ill. App. 460; *Bonner v. The People*, 40 Ill. App. 628, and *Ferrias v. The People*, page 559, this volume. Treating the case then as a

writ of error sued out by the administrator from the order of the Circuit Court, we find the record does not contain a single objection or exception by him to the action of the Circuit Court. The clerk's record recites that Poundstone and several other claimants, entered an exception to the finding and judgment of the court. The certificate of evidence recites only that Poundstone excepted thereto. But we think it clear the administrator can not have the benefit of the exception taken by Poundstone or any other claimants. For all that appears from the record of the court below, the administrator may have been entirely satisfied with the order entered. Indeed he did not appeal from the order of the Probate Court. That was an equally irregular appeal by claimant, attempted in the name of the administrator.

If, however, the practice in this class of cases is so far assimilated to the practice in chancery that no exceptions to the action of the court below were required in order to permit the administrator to question the judgment below, we are then brought to the consideration of another proposition. Appellees insist that the transactions out of which the note in controversy arose were binding upon R. J. Hornick; that the administrator takes no greater rights or better title than the deceased had, and therefore said transactions are binding upon his administrator. This was evidently the view taken by the Probate Court, for it found and adjudged that the transactions in question were fairly entered into by said deceased upon a good consideration, and that the administrator was estopped from questioning the rights of said trustees, and from claiming said note. The order of the Circuit Court was more general, and adjudged the trustees entitled to the note without specifying the grounds of its judgment. As the principal position taken by the party assigning errors on this record is that the transaction out of which said note arose and the manner in which the trust was conducted were fraudulent as to subsequent creditors, we are now required to determine whether, under the provisions of section 81 of the administration act, or by virtue

of any other power or duty cast upon the administrator, he can raise that question. It becomes necessary to state the more material facts.

Prior to May, 1893, Richard J. Hornick and John Hornick were partners in a general merchandise business at Grand Ridge, La Salle county, under the name of R. J. Hornick & Co. It seems to be conceded R. J. Hornick was the active partner and alone conducted the business. In May, 1893, they were heavily indebted and made an assignment for the benefit of creditors, pursuant to the statute, and the County Court took jurisdiction thereof. Afterward, on May 29, 1893, R. J. Hornick & Co. entered into an agreement with their creditors, that each creditor should retain or be given a note of the firm, but should take no steps to collect it for three years; that the creditors should select trustees; that J. R. Hornick should convey all his real estate except his residence to said trustees, for sale and division among the creditors; that all outstanding notes and accounts of the firm should be assigned to said trustees, and the proceeds, together with all cash on hand except \$1,500, should be divided among the creditors; that the assignment proceedings should be discontinued, and the business of R. J. Hornick & Co. continued as before (that is, by R. J. Hornick), but on a cash basis, and when net profits were realized beyond the immediate needs of the business they should be turned over to the trustees for distribution among the creditors, and the trustees were to have access to the books of the business, and to show its condition, etc. This composition agreement was signed by the individual members of the firm and also in the firm name, and also by ninety-six creditors. A meeting of the creditors was held and they selected the appellees as their trustees. The firm then executed a conveyance of their choses in action and book accounts to said trustees, specifying in said instrument the details of the trust with great precision, and requiring the trustees to turn everything into money, pay the expenses of the trust, pay and discharge all lawful debts owing by said firm May 29, 1893, and to render the overplus, if any,

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to the firm. There were many other provisions in said instrument, and among them the following: "It is further agreed by and between the parties hereto, that the said parties of the second part shall have the right at all reasonable times, of access to the books of said R. J. Hornick & Co., together with the right to examine into the manner in which said Hornick & Co. may conduct its said business, and in case said parties of the first part shall willfully and negligently conduct said business so that the assets thereof are likely to be squandered, then said parties of the second part shall have the right to assume control and direction of the said business. In case of the death of the said R. J. Hornick prior to the execution of the trust herein, said parties of the second part shall have the right to conduct said business, or sell the assets of said business for the benefit of said creditors." The contract also required the trustees to give bond in the sum of \$20,000, for the faithful performance of the trust. Richard J. Hornick conveyed his real estate to said trustees pursuant to said agreement. At the time this agreement was made, the indebtedness of the firm was about \$63,000. At the time of the hearing in the Circuit Court, over \$50,000 had been paid upon said debts under said agreement. After the making of said agreement, and the transfers to said trustees, R. J. Hornick conducted the business under said contract, but not on a strictly cash basis. He occasionally bought and sold on credit.

At one time the stock of goods in his hands was destroyed by fire. He used the insurance money to buy another stock. R. J. Hornick died June 16, 1896. A few minutes before or after his death the trustees took possession of said store and stock of goods, pursuant to the provision of said contract above set out. Ten days later they sold said stock of goods to Frank K. Hook for \$6,325.23, and took the note in question therefor. At the trial in the Circuit Court it was conceded they sold for an advantageous price, and that the note was good.

It is obvious this arrangement was in all respects valid and binding between these parties. The evidence shows the

plan was devised by R. J. Hornick to prevent his estate being squandered in assignment proceedings without discharging his debts. The contract was beneficial to him. The ninety-six creditors signing the agreement bound themselves not only to dismiss the assignment proceedings, but also not to sue his firm for the debts it owed them for three years. He could not avoid the transaction nor assert its invalidity. We understand it to be the settled law of this State that an administrator takes the estate as he finds it, *cum onere*; that he stands in the shoes of the deceased, and that whatever would bind the property in the hands of the deceased binds it in the hands of the administrator. Some States have statutes authorizing the administrator to attack the acts of the decedent as fraudulent. In other States the courts hold the administrator represents the creditors and may assert their rights, and so may assail a transaction for fraud of his decedent. But in many other States, and among them Illinois, the administrator is not permitted to assail or impeach the acts of his intestate. 1 Woerner's American Law of Administration, Section 296. Most of the cases in Illinois relate to real estate, but the principle laid down is broad and general, and applicable to personalty. Thus in *Choteau v. Jones*, 11 Ill. 300, the court said: "The former" (the heirs) "could take no greater estate than their ancestor had; the latter" (the administrator) "could assert no greater right than his intestate could have done. An administrator is not the agent or trustee of the creditors for the purpose of avoiding a voluntary conveyance. He is the representative of the intestate, and succeeds to his right and interests. He stands in his place and is bound by his acts."

In *Alexander v. Tams*, 13 Ill. 221, this language was used by the court: "The record shows that Wilbourn" (the intestate) "repeatedly declared that he paid nothing on the land" (which declaration was in fact untrue); "but that all was paid by Alexander. These declarations would have prevented him from recovering back the money he advanced, and they are equally binding on his administrator." In

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White v. Russell, 79 Ill. 155, a member of an insolvent firm withdrew money from the firm, and for the purpose of placing it beyond the reach of the creditors, bought a lot with said money and had it conveyed to his wife. After his death the creditors sought to reach it, and it was urged that was the province of the administrator. The reply of the court was: "Where a debtor in his lifetime makes fraudulent conveyances to hinder or delay his creditors, such conveyance, though void as to creditors, is binding on his heirs and representatives. Neither his heirs, executors or administrators, can maintain a bill to set aside the conveyance, as it is binding on them." *Beebe v. Saulter*, 87 Ill. 518.

In *Sumner v. McKee*, 89 Ill. 127, speaking of a mortgage on chattel property which was void as to third persons, the court said that the widow, heirs and administratrix "stand in the shoes of the deceased, and are his representatives, and concluded by all lawful acts and contracts he may have entered into or performed." In *Hardin v. Osborne*, 94 Ill. 571, the court said that the executor holds the property subject to all liens, claims or equities, precisely as did the testator. The law vests the title to personalty for the benefit of creditors in an administrator, and yet he only takes it as it was held by the intestate." So in *Griffin v. Wertz*, 2 Ill. App. 487, it was said: "The administrator takes the personal property of the deceased as his representative and acquires no better right than he had." In *Eads v. Mason*, 16 Ill. App. 545, this court had before it an appeal brought by certain creditors of a deceased debtor, who, while insolvent, had given certain bank stock to his wife. We there said: "If the gift of this bank stock was fraudulent as to pre-existing creditors they alone can reach it. An administrator can not avoid a voluntary deed of his intestate, nor can he take advantage of a fraudulent conveyance made by his intestate." In *Ellis v. Petty*, 51 Ill. App. 636, where it was claimed property had been placed in the hands of the appellee by her husband for the purpose of avoiding the payment of his debts, the court said: "The transfer might be impeached by the creditors if it was a fraud upon them, but it could not be by the administrator."

If further reason were needed why the administrator should not be permitted to have the relief here sought, it will readily occur, upon reflecting what creditors could be heard to assail this composition agreement as fraudulent. The transaction clearly was not fraudulent as to pre-existing creditors who were parties to the arrangement. The evidence shows claims to the amount of about \$13,000 have been allowed by the Probate Court against the estate of R. J. Hornick, deceased. Among them is at least one who was a creditor before the composition agreement was made. As petitioner did not show his name, and has not set out in the certificate of evidence the ninety-six names signed to the composition agreement, we assume this creditor signed it. If the administrator succeeds in reaching this note in the hands of the trustees, this claimant will receive his share of the note divided *pro rata* among claims amounting to \$13,000, instead of his share divided *pro rata* among claims amounting to \$63,000 principal, as he agreed, and that on the ground that the transaction was fraudulent, notwithstanding he was a party to the transaction and has received dividends thereunder to the amount of eighty per cent. Again, the transaction could only be assailed as fraudulent by subsequent creditors who were deceived by the appearances into supposing that R. J. Hornick individually owned the property in his charge, and who extended credit to him on the faith of such appearances. It will hardly be claimed this arrangement could be fraudulent as to subsequent creditors who dealt with R. J. Hornick and extended him credit with a full knowledge of all the facts. The claimant, who sought to be appellant here, represents only a few hundred dollars out of the \$13,000 of claims filed. There is no proof in this record a single subsequent creditor was deceived, but if some were, others may not have been. Even if the claimant who sought to appeal has some title to avoid the transaction, it does not appear that the other claimants who have not intervened, and who hold over \$12,000 of the claims against the estate, have any right whatever to attack it. To turn this note over to the administrator would be to set

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the transaction aside, not only for the benefit of such creditors, if any, as were deceived and defrauded, but also for the benefit of the creditors who may have dealt with Hornick with a full knowledge of all the facts, and also for the benefit of the claimant who was a creditor prior to this transaction, and a participant therein. Obviously, the deceived creditors, if any, are the only ones to whom relief can be granted, and not the administrator, who must make *pro rata* division of all he receives among all creditors having claims allowed, even if they were neither deceived nor defrauded.

The fourth assignment of error is: "The court erred in rendering judgment against appellants for costs." The judgment was, "that said appellants pay the costs of this proceeding." As above stated, the administrator did not appeal from the Probate Court to the Circuit Court. The judgment is not in terms against the administrator, and we are satisfied it was not intended to be against him, but against the claimants who had attempted to appeal from the Probate Court in his name. As the judgment is not against the administrator, the error is not well assigned. Whether the Circuit Court had such jurisdiction of said claimants as to enable it to render a valid judgment against them for the costs, is a question which does not concern the administrator, who alone assigns error on this record. Judgment affirmed.

George Ingram v. Samuel R. Ingram.

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1. **MORTGAGES—Sales Subject to—Liability of Grantee.**—When a grantee in a deed conveying lands, upon which there is a mortgage securing a debt, assumes and agrees to pay the debt as a part of the consideration for which the lands are conveyed to him, he thereby becomes personally liable to the mortgagee and may be sued by him, and may also be held responsible for any deficiency upon a foreclosure of the mortgage and sale of the premises.

2. **SAME—Sales Subject to—Rights of Mortgagor Where Land is Reconveyed to Him by Warranty Deed.**—A sold certain land to B, who

assumed and agreed to pay a mortgage thereon. At a later date, B deeded the same land to A by a warranty deed. After B's death, the mortgage remaining unpaid, A filed a petition in the County Court against B's administrator and heirs, asking for an order for its payment. *Held*, that B's estate was liable for the amount of the mortgage and that payment thereof by A was not necessary to entitle him to proceed against the estate to enforce its collection.

8. EVIDENCE—*Explanatory of a Written Instrument*.—The oral testimony heard on the trial of this case leads to no different conclusion than that to be drawn from the papers, but is merely explanatory, and this court see no impropriety in its consideration by the trial court.

Petition, in probate. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

H. MAYO, attorney for appellant.

When Seth Ingram, upon February 3, 1894, by virtue of receiving the deed of Samuel R. Ingram, and executing the contract to him, of even date therewith, assumed the Hodge mortgage, he became, as between himself and Samuel Ingram, the principal debtor as to the mortgage debt, and Samuel Ingram became surety; and therefore Samuel can not now, in any event, compel the estate to relieve him from the payment of this mortgage until he has paid it off himself.

That the relation of principal and surety arises in cases of this nature, see Jones on Mortgages, Vol. 1, Sec. 741; Dean v. Walker, 107 Ill. 540; Flagg v. Geltmacher, 98 Ill. 293; Kinney v. Wells, 59 Ill. App. 271; Am. & Eng. Ency. Law, Vol. 15, 837; Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187. The rule in this State is that "a surety has no cause of action over against the principal until he has paid the debt." Shepard v. Ogden, 2 Scam. 257; Bonham v. Galloway, 13 Ill. 68; Stevens v. Hurlburt, 25 Ill. App. 124.

The Supreme Court has repeatedly laid down the rule, that where a grantee sues his grantor for a breach of a covenant against incumbrances, "the grantee can recover only such damages as he has sustained, and if he has not been disturbed, or has paid nothing to remove incumbrances,

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he can recover only nominal damages." *Willets v. Burgess*, 34 Ill. 494; *McCord v. Massey*, 51 Ill. App. 186.

The obligation, then, which Seth Ingram took upon himself when he assumed the mortgage debt, by the deed and contract of February 3, 1894, and which obligation remained unimpaired until November 30, 1894, was substantially this: Seth Ingram became the principal debtor, as to this debt upon the land, and Samuel became surety for the payment of the debt. Hodge could still maintain an action, provided the debt fell due, against Samuel and recover the amount of the debt from him, and in such a case Samuel would have had the right to be subrogated to the rights of Hodge as against the land. But Samuel could in no event have a right of action against Seth until he had himself paid the debt.

In support of this position we cite the following authorities: *Halsey v. Reed*, 9 Paige (N. Y.), 446; *Wright v. Butler*, 6 Wend. (N. Y.) 284; *Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229; *Ayers v. Dixon*, 78 N. Y. 318.

It has been held in this State, where a question similar to the one here involved arose between the heirs and personal representatives of a deceased person, that when a man purchases, or has devised to him, land with an incumbrance on it, he becomes a debtor only with respect to the land, and if he promises to pay it, it is a promise rather on account of the land, which continues, notwithstanding, to be the primary fund; and the same equity which, in other cases, makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estate. *Sutherland v. Harrison*, 86 Ill. 366; *Duke of Cumberland v. Codrington*, 3 Johns. Ch. (N. Y.) 229 and notes; *Mount v. Van Ness*, 33 N. J. Eq. 262; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Halsey v. Reed*, 9 Paige (N. Y.), 446.

SNOW & HINEBAUGH, attorneys for appellee.

There is no reason why an agreement may not be made which shall bind the party so contracting, to pay the debt

which another owes, and thus relieve him or his estate from it, and if the promise thus made is not kept, why the promisee should not recover a sum sufficient to enable him to do so. *Furnas v. Durgin*, 119 Mass. 500; *Wilson v. Stillwell*, 9 Ohio St. 467; *Stout v. Folger*, 34 Iowa, 74; *Lethbridge et al. v. Mytton*, 2 Barn & Ad. 772; *Penny v. Foy*, 8 Barn. & Cress. 11.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Seth Ingram died testate June 12, 1895, leaving a number of children, among whom are appellant and appellee. This suit originated in the Probate Court of La Salle County by the filing of a petition by said Samuel R. Ingram in the estate of said Seth Ingram, deceased, asking that the executors be ordered to pay two certain mortgage debts, which it was alleged deceased in his lifetime had assumed and agreed to pay, and to refund to petitioner certain interest he had paid thereon. All parties in interest, including the holders of said mortgage debts, were made defendants to the proceeding and were duly summoned, and George Ingram and others answered. There was a hearing and an order directing said executor to pay one of said mortgages, and to refund to petitioner interest paid by him thereon, and disallowing the prayer of the petition as to the other mortgage. George Ingram appealed to the Circuit Court, where there was another hearing and a like order, from which he appeals to this court. No cross-errors are assigned, and as the mortgage disallowed had no important connection with the transaction hereinafter set forth, it will not be further mentioned.

The facts are not disputed and are as follows: On and prior to February 3, 1894, Samuel R. Ingram owned a farm of one hundred and seven acres, being those parts of the southwest quarter of section 6, and of the northwest quarter of section 7, which lie west of the Illinois Central Railroad in Groveland township, La Salle county, Illinois. Upon said lands was an unpaid mortgage, executed by Samuel and his wife to Lewis J. Hodge, of Wenona, Ill., given in March,

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1892, securing a note of Samuel for the principal sum of \$6,000, with interest at seven per cent per annum, payable five years from date, and on which note the interest for 1893 had not been paid. Samuel was also owing his father, Seth, a note, dated October 22, 1892, due one year after date, for the principal sum of \$3,500, with interest at six per cent per annum. Whether there was any interest due and unpaid on this note does not appear. On February 3, 1894, Samuel sold and conveyed said farm to his father by warranty deed for the sum of \$10,700, which consideration was made up of the Hodge note, principal and back interest for 1893, all of which the father assumed and agreed to pay, and for the balance the father agreed to turn over all notes and accounts he had against Samuel. The deed from Samuel contained this provision: "This deed is made subject to a certain mortgage, dated in 1892, wherein Lewis J. Hodge is mortgagee, for the sum of \$6,000, at seven per cent interest, said sum being due in five years after date, and being part of said consideration." The parties also at the same time signed a separate written agreement, wherein they recited that Samuel had sold to Seth one hundred and seven acres, more or less, for \$100 per acre; that Seth was to assume the mortgage of \$6,000, given to L. J. Hodge, of Wenona, Illinois, and that for the remainder of said payment, Seth was to turn over all notes and accounts he had against Samuel, in full to date. The agreement then described the land, and Seth therein further agreed to pay the interest on the \$6,000 mortgage for 1893. The principal sums of said assumed mortgage and surrendered note amounted to \$9,500. The back interest on said notes would nearly bring the total up to the \$10,700 called for by the deed, and the written agreement implies there were other notes and accounts held by the father against Samuel, which were to complete the consideration for the deed. On the same day Seth gave Samuel another paper, bearing that date and signed by Seth, the body of which reads as follows: "This is to certify that I have received of Samuel R. Ingram all moneys and accounts in full to date." On

the same day Seth and his son, Samuel, also executed another written instrument, by which Seth leased said lands to Samuel for five years, beginning March 1, 1894, and ending March 1, 1899. As rent, Samuel agreed to deliver two-fifths of the corn and oats, and also to pay \$50 a year for the grass land, orchard, garden and building. No proof was introduced that in any way attacked these transactions. The consideration was adequate; both parties were competent to transact the business, and great pains was taken to have the papers fully express their agreements. By those papers Samuel parted with his land, and then leased it from his father for five years for an adequate rent. In return for his land his debts to his father were canceled, and provision was made that his father should pay the \$6,000 Hodge note and mortgage, with the back interest overdue thereon.

The law is well settled in this State that where a grantee in a deed conveying lands upon which there is a mortgage securing a debt, assumes and agrees to pay said debt as a part of the consideration for which the lands are conveyed to him, he thereby becomes personally liable to the mortgagee for the payment of said debt, and may be sued at law for said debt by the mortgagee, and may also be held responsible for any deficiency upon a foreclosure of the mortgage and sale of the premises. *Dean v. Walker*, 107 Ill. 540; *Daub v. Englebach*, 109 Ill. 267; *Bay v. Williams*, 112 Ill. 91; *Schmidt v. Glade*, 126 Ill. 485; *Fish v. Glover*, 154 Ill. 86; *Hume v. Brower*, 25 Ill. App. 130; *Way v. Roth*, 58 Ill. App. 198. Upon the completion of said transactions of February 3, 1894, Seth Ingram became personally liable to Hodge to pay him at once the back interest, and to pay him the future installments of interest and the principal debt as each should become due. This did not interfere with Samuel Ingram's liability to Hodge. Hodge thereafter had the right to hold both Samuel and Seth liable to him as principal debtors; but as between Seth and Samuel, Seth became the principal debtor, and Samuel a surety, and as between them the mortgaged property became the primary

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fund. If in this state of the case Seth had died, Hodge could have secured the allowance of the claim against Seth's estate; he could have sued Samuel at law and collected from him; he could have foreclosed the mortgage and had a deficiency decree against Samuel and also a deficiency decree against the executor to be paid in due course of administration. If Samuel had paid all or any part of the debt, either voluntarily or by compulsion, he could have filed a claim therefor against his father's estate and secured its allowance. In no way could Samuel have been compelled to relieve the estate of his father from the final payment of the debt. It was only in the event that the land mortgaged and his father's other estate should prove inadequate to pay the debt, that any final loss could fall upon Samuel because of said mortgage debt.

But before Seth's death another transaction occurred between them. By a warranty deed dated and acknowledged November 30, 1894, and duly filed for record, Seth Ingram conveyed to his son, Samuel, this one hundred and seven acres in La Salle county, and eighty acres in Marshall county, for the expressed consideration of one dollar, said grantor therein reserving to himself the coal underlying said real estate, and the right to mine and remove the same, and reserving to himself and to his estate in case of his death the possession of said real estate for the period of five years from the date of said deed, and so long thereafter as said Seth should live. Nothing in the evidence assails the validity of this instrument. Did it effect any change in the rights of the parties as fixed by the previous transactions? It contained no intimation that the conveyance was subject to the Hodge mortgage, or that Samuel was to pay it. On the contrary, by the use of a statutory deed, Seth covenanted with Samuel that he was lawfully seized of an indefeasible estate in said premises in fee simple, and that they were then free from all incumbrances. R. S., 1874, C. 30, Sec. 9. By this instrument he again bound himself to pay the Hodge mortgage resting upon said La Salle county lands. The only change that we conceive this last deed made in the relations of

the parties, is that from the time of the delivery thereof the mortgaged property was no longer, as between Samuel and Seth, the primary fund. Hodge could still proceed against both Samuel and the land, but Seth had no further right to have the debt paid out of the land. As between Samuel and Seth the latter was required by the covenant in the last deed to keep the land free from prior incumbrances.

We have thus far considered the case only in the light of the instruments which passed between the parties. But there is oral evidence in the record explaining the last deed. Seth Ingram, at the same time he had that deed prepared, also had several other deeds drawn running to other of his children and grandchildren, conveying to them other real estate, and with the like reservation of possession to himself and to his estate. He employed for this purpose a competent solicitor, and explained to him quite fully what he was doing and the motives which prompted him. He did not convey all his real estate to his children and his grandchildren, but reserved what he considered sufficient to pay all his debts, and he enumerated his debts to his solicitor, and described this \$6,000 mortgage as one of the debts which he had to pay, and for the payment of which he considered the property he still retained was amply sufficient. The solicitor in question had previously drawn Seth Ingram's will, and at the making of these deeds, Seth explained to him that he had been induced to make these deeds to his children and grandchildren, by the fact that some of his children were threatening to fight his will, and had said the old man was not competent to do business, and he said that he had decided to show them that he was competent by making such a disposition of his property by deed as he chose. This oral evidence was objected to by appellant, and no ruling was made by the court below upon its competency. As the oral testimony leads to no different conclusion from that to be drawn from the papers, but is merely explanatory, we see no impropriety in its consideration by the court. The opinion, however, of the trial judge printed in appellee's brief, shows that he did not treat the oral testimony as competent.

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By an amendment to his petition in the Probate Court, appellee charged that the executor of the estate of Seth Ingram refused to pay the annual interest on said \$6,000 mortgage, and that on March 19, 1896, appellee paid the same in the sum of \$420. This allegation was proved. Under the principles above stated this gave appellee a clear right to an order for the payment to him of the \$420, as a seventh class claim, and such order was entered. The remaining question is whether he was entitled to the further order for the payment of the principal and future interest by the executor without having himself paid the debt. It is clear that if he had paid off this mortgage, he could have compelled the allowance of the debt in his favor. But Hodge was not bound to incur the expense of proving the debt as a claim against the estate. He had a right to look to Samuel and to the land, and may have considered that security sufficient for his purposes. If, however, the claim was not in some way exhibited to the Probate Court within two years from the granting of letters testamentary, as provided by sections 60, 61 and 70 of the administration act, Samuel would be left to pay the debt, or to suffer his land to be sold for its payment, without recourse against his father's inventoried estate. Courts, when acting under equitable rules, as here, do not usually require unnecessary acts. If Samuel had paid this debt and then filed his claim therefor against the estate, that step, while perhaps seriously embarrassing him, would not have benefited the estate. Its liability would not thereby be increased or diminished. It could make no difference to the estate whether the claim was filed in the name of Hodge or Samuel R. Ingram. By the course appellee pursued he brought Hodge and the executor and all the heirs before the court, and there obtained an adjudication binding upon them all, that the estate must pay this debt in due course of administration as a seventh class claim to Hodge, or to himself if he first paid it. We think appellee had a right to pursue this course, and thereby to cause the claim to be exhibited to the court, and the liability of the estate to be fixed before

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the end of the two years. Equitable results were reached, and such considerations prevail in the administration of estates. The judgment of the Circuit Court will therefore be affirmed.

Minneapolis Threshing Machine Co. v. George Higgins.

1. *SALES—A Contract of Sale Construed Not to Warrant Goods Sold to be Merchantable.*—A contract called for "one hundred cords of good second-growth oak wood, dry, to be delivered in Rockford during the month of October, 1895, at \$4.50 per cord." In a suit by the vendee to recover for a breach of the contract, the court discusses the circumstances of the case, and holds that the contract, construed in the light of the acts of the vendee's agents, did not mean and was not intended to mean that the wood should be merchantable in Rockford.

2. *CONTRACTS—A Contract Construed.*—The court holds that the contract mentioned in note one did not mean that the vendor was to deliver wood worth \$4.50 per cord, but that wood filling the description given was to be received by the vendee at \$4.50 per cord, as payment upon the debt in said contract described.

Assumpsit, on a contract of sale. Appeal from the Circuit Court of Winnebago County; the Hon. J. C. GARVER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

FISHER & NORTH, attorneys for appellant.

In the sale of personal property, if upon arrival at the place of delivery the goods are found to be unmerchantable, in whole or in part, the vendee has the option to reject them, or receive them and rely upon the warranty. *English v. Spokane Com. Co.*, 57 Fed. Rep. 456.

The goods sold must conform to the terms of the warranty at the place of delivery. *Sedgwick on Damages*, 8th Ed., Sec. 771; *Bridge v. Wain*, 1 Stark. 504; *Addison on Contracts*, Vol. 1, Sec. 240.

The goods delivered must correspond with the goods purchased at the time and place of delivery. *Crabtree v. Kile*, 21 Ill. 185; *Story on Sales*, Sec. 454.

By the great weight of authority it is now well settled that if the goods upon arrival at the place of delivery are

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found unmerchantable in whole or in part, the vendee has the option either to reject them or receive them and rely upon the warranty. *English v. Spokane Com. Co.*, 57 Fed. Rep. 456; 2 Schouler, Personal Property, Secs. 581-583; 2 Benjamin on Sales, Sec. 997 and note 29; 2 Benjamin on Sales, Secs. 1353 to 1356; *Babcock v. Trice*, 18 Ill. 420.

In cases of executory contracts, or contracts to deliver a specific article, if, on delivery, they prove not to satisfy the agreement, the plaintiff, as we have seen, is not bound to retain the articles, but he may return them within a reasonable time, and, if paid for, recover back the price paid. *Sedgwick on Damages*, 8th Ed., Sec. 759; *Diversy v. Kellogg*, 44 Ill. 119; *Clark on Contracts*, 671; *Pope v. Allis*, 115 U. S. 363; 5 *Field's Lawyers' Briefs*, Sec. 347.

Under the contract declared upon, plaintiff agreed and was bound to deliver wood that was good in the city of Rockford, and wood that was reasonably merchantable. This was an executory contract. *Foos et al. v. Sabin*, 84 Ill. 564; *Babcock v. Trice*, 18 Ill. 420; *Misner v. Granger*, 4 Gil. 69; *Fish et al. v. Roseberry*, 22 Ill. 299; *Doane et al. v. Dunham*, 65 Ill. 516; 5 *Field's Lawyers' Briefs*, Sec. 290.

In the case at bar the proof shows that the defendant had over 200 cords of wood in his clearing.

Knowing that he contracted to deliver good wood to the plaintiff in the city of Rockford, he could easily have performed his contract by throwing out and retaining for his own use, or other disposal, the small and crooked wood and delivering only the good wood, and such wood as was reasonably merchantable to plaintiff in Rockford. Here was an express warranty that it should be good wood in the city of Rockford. 5 *Wait's Actions and Defenses*, 555; 5 *Field's Lawyers' Briefs*, Secs. 287, 290 and 347.

FRANK S. REGAN and A. D. EARLY, attorneys for appellee.

The rule most conspicuous and wide reaching of all is that a written contract shall be so interpreted as, if possible, to carry out what the parties meant. *Bishop on Contracts*, Sec. 380.

It is a question for the jury whether the thing delivered

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be what was really intended by both parties as the subject-matter of the sale, although not very accurately described. 2 Benjamin on Sales (4th Ed.), Sec. 927.

Where a known, described and defined article is ordered by a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. 2 Benjamin on Sales (4th Ed.), Sec. 987.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Appellant sold appellee certain farm machinery for \$1,900. There was a written contract, of which two copies were executed, one for each party. These were not exactly alike in reference to the matter here litigated. During the trial the parties agreed Exhibit "D" should be treated as the contract. It showed appellee, in payment for said machinery, was to deliver to appellant certain securities therein described, and "one hundred cords of good second-growth oak wood, dry, to be delivered in Rockford during the month of October, 1895, at \$4.50 per cord." Appellee lived two and a half miles from Davis Junction, and some fourteen miles or more from Rockford, and in another county. Appellant had several agents who acted in its behalf in the matter here involved. Hadley was general agent for Northern Illinois, with headquarters at Peoria; Harvey was agent at Rockford, and Borden at Davis Junction. When the time for delivering the wood arrived, appellee was ready to deliver and so notified Hadley, who was then at appellee's farm. Hadley said it was too warm to sell the wood then, and the company had no place to store it, and did not wish to pay storage on it, and asked appellee to deliver it later, to which appellee consented. Hadley told him they would give him plenty of time if he would only let it stand there till later. On November 25th, Hadley wrote him it was possible they would be able to sell soon, and asked appellee if it would be convenient for him to commence to deliver. Appellee replied he wanted to commence right away.

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Appellant, however, allowed the matter to drift along till February, when Harvey wrote appellee to ship seventy cords to Rockford as soon as he could, as the company wanted it there before the first of March. Appellee hauled about fifty cords to Davis Junction, and loaded three cars, and was loading and shipping the wood as fast as he could get cars. Before he began shipping Harvey had told him to throw out the small wood. When Harvey had unloaded the first car at Rockford he went to Davis Junction, and told appellee that there was no use of his loading that wood, for appellant would not accept it unless he would throw out the small wood. Harvey then returned to Rockford and sent appellee a written notice that the wood was not up to contract and he would not accept it, and that it was at Rockford subject to appellee's orders. The other two cars reached Rockford and appellant refused to receive them, and the railroad company unloaded the wood. On March 17, 1896, Harvey delivered formal written notice to appellee that by reason of his failure to deliver the wood at the time agreed upon, and of the quality agreed upon, appellant had refused to accept the wood and would hold him for the value thereof. Thereupon appellant brought this suit against appellee, and there was a verdict and judgment for the defendant, from which this appeal is prosecuted.

At the trial appellant claimed the contract called for wood merchantable at Rockford, and wood dealers at Rockford testified in its behalf that the car of wood they saw at Rockford contained numerous small sticks and some crooked ones, and was not merchantable at Rockford, and was not worth as much as merchantable wood, and was not worth \$4.50 per cord. Appellee proved the contract in question was made on appellee's farm; that he was visited there by four agents of appellant while the provisions of the contract were under negotiation, and one of them was present on the farm when the contract was signed. About two hundred cords, including the wood in question, had been cut and piled on said farm a year and a half before, and it was standing on the farm when the contract was signed. Appellee

offered to prove that the final negotiations were completed a few rods from this wood; that the agent and he had a conversation at that time about this particular wood before the contract was signed, and that the one hundred cords to be delivered were part and parcel of the wood there present before the agent. The trial court refused to admit this testimony, and thereby prevented appellee from going directly into the defense that this was the wood appellant was to take under the contract. Thereupon appellee proved by numerous witnesses that this wood was good, dry, second-growth oak wood, and merchantable at Davis Junction.

Notwithstanding the exclusion of the direct inquiry, we are of opinion the facts and circumstances in evidence show appellant's agents made this contract with reference to one hundred cords of the wood appellee then had cut and piled on his farm. Two agents of appellant visited appellee at one time after this contract was made, and asked him to make them an offer for the wood, and one of them said "they" (evidently meaning appellant) "did not want the damned wood." Still later Borden came and brought a man with him that wanted to see the wood, and they went where this wood was. In a letter written by Hadley to appellee in November he speaks of this as "the wood purchased of you." In January, 1896, Hadley wrote appellee: "Hasn't Harvey done anything with that wood yet?" Still later Borden came to appellee and said he wanted to go and see the wood, and went and looked at this wood, and then tried to get appellee to sell thirty cords of it, saying he had sold seventy cords to the supervisors. Still later Harvey wrote him to have "the seventy cords of wood shipped," and inquired "what success have you selling the thirty cords?" At one of these interviews Harvey asked appellee if he could not use some of the small wood at home, and said he would like it if appellee would do so. At the same interview a neighbor was present and Harvey tried to sell him this wood, and called it good wood. On February 14, 1896, Harvey wrote appellee he would have to throw out the small wood, as the supervisors would not accept it with the small wood in. Most of this evidence was not contra-

dicted. From these and other circumstances proven it is clear to us that it was not the understanding of appellant's agent when he made this contract, or of its other agents who transacted this business, that appellee was from some unknown source to ship one hundred cords of wood, merchantable in Rockford, but that he was to ship one hundred cords of this wood then piled on his farm, and that said agents then knew part of it was small, and that no intention to object to small wood existed till appellant made a sale to the county and found the supervisors would not take small wood. We are of opinion these acts of the parties show what construction they placed upon the contract, and show that this was the wood which it was intended by the contract, appellant was to receive, and that the reference to Rockford was only to bind appellee to pay the expense of shipping to that point. It follows that the contract, as so construed by the acts of appellant's agents, did not mean, and was not by them supposed to mean, that appellee was to ship wood which would be merchantable in Rockford.

The evidence also shows that second-growth wood is small, and that this was dry oak wood, second growth, and good of its kind, and that it filled the description in the contract. The mention of \$4.50 per cord in the contract can not possibly be construed to mean that when appellee delivered the wood in Rockford it was to be worth \$4.50 per cord there. The items of payment enumerated in the contract before the wood was mentioned amounted to \$1,550, and then one hundred cords of wood at \$4.50 per cord was named and made up the \$1,900, the price of the machinery. The \$4.50 did not express the value of the wood per cord, but the price at which the appellant agreed to take it in payment for the machinery. It follows from what has been said, that in our opinion the court below committed no substantial error against appellant in its rulings upon the evidence and instructions here complained of. The verdict we regard as just, and the judgment thereon will be affirmed.

71	512
177	368

71	512
112	*592

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1. **ADMINISTRATION OF ESTATES—*Imperfect Inventories.***—An administrator filed an inventory, showing among other assets a note signed by himself valued at “\$3,900, less payments.” *Held*, that the heirs might have obtained from the County Court an order for a more perfect inventory showing the precise amounts claimed to have been paid on the note, but that having failed to do so, they could not insist on having the administrator charged with the face of the note regardless of payments, merely because of the admission contained in said inventory.

2. **SAME—*Uncredited Payments on a Note Can Not be Allowed as a Claim Against an Estate.***—An administrator filed a partial report in which he charged himself with the amount due on a note after deducting certain alleged payments which were not indorsed on the note. An heir objected to the final report, claiming that the administrator should have filed his claim against the estate and had a special administrator appointed to defend, and that until a claim for the payments was so allowed he could not take credit therefor. *Held*, that payments to the deceased on a debt could not constitute a claim against her estate, and that the objection was not well taken.

3. **SAME—*Appointment of Administrator Pro Tem.—Duty of Court as to Reports.***—Every time an administrator presents a report, it is possible that some one might advantageously resist its approval in the interest of the heirs and creditors, but the law has not provided for the appointment of an administrator *pro tem.* for such purposes, but has made it the duty of the county judge to scrutinize such matters, ascertain the facts and protect the interest of all.

4. **SAME—*Jurisdiction of County Court—Effect of Approval of Partial Report.***—An administrator presented a partial report, in which he charged himself with the balance due on a note after deducting certain alleged payments not credited on the note, and the report was approved. On an appeal from an order approving a final report, it was *held* that the County Court had jurisdiction to hear and determine the matters presented by the administrator's first report; that its adjudication as to the amount due to the estate was *prima facie* correct, and that unless an heir assailing its correctness showed by a preponderance of the evidence that the item in the first report as to the amount due on the note was incorrect, the judgment approving such report must stand.

5. **SAME—*Presumptions in Favor of Rulings of County Court.***—The court must assume, where nothing appears to the contrary, that a county court performed its duty in passing on the report of an administrator; that it heard only competent testimony, and that a fact found by it was established by proper proof.

6. **APPEALS AND ERRORS—*An Appellant Can Not Complain of His Own Questions.***—An appellant can not complain of questions he himself puts, nor the answers thereto, and whether such questions were proper

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cross-examination, or whether the appellant made the witness his own upon the subject, is immaterial.

Petition, by an administrator for approval of final report and for a discharge. Appeal from the Circuit Court of Carroll County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

HENRY MACKAY, attorney for appellant.

On a report made by an administrator, an order of distribution in the County Court, without notice to the persons entitled thereto, is void, and an order at a subsequent term of the County Court, setting the same aside, is proper. Long v. Thompson, 60 Ill. 27; Schlink v. Maxton, 153 Ill. 447.

If an administrator or executor has a claim against an estate he must file it the same as other persons. If he credits himself with payments in his report of taxes, etc., made in the lifetime of the intestate, they are improper. R. S., Chap. 3, Sec. 72; Corrington v. Corrington, 15 Ill. App. 393.

The County Court has full power on motion by an heir at a subsequent term to set aside a judgment entered in favor of an administrator who has presented a claim. Such a judgment is not final; it can be opened for fraud, concealment or mistake. Courts may correct mistakes on final settlement and do complete justice between parties. There is no privity between the administrator and heir. Schlink v. Maxton, 48 Ill. App. 471; S. C., 153 Ill. 447; 7 Am. & Eng. Enc. of Law, 442.

The burden of proof on appeal is on the administrator to show that he has accounted for the amounts inventoried by him. It is a trial *de novo*, the administrator holding the affirmative, alleging he has fully administered. Heward v. Slagle, 52 Ill. 336.

A County Court has power to undo what has been done by fraud or concealment in the administration of an estate, whether in the procurement of allowance of claim or in an order finding a settlement. When an administrator comes into court asking for the benefits of a former order allowing a claim against an estate in his own favor he must be pre-

pared to show, if the case require it, that such decree or order was right. *Shepard v. Speer*, 41 Ill. App. 211; *Wadhams v. Gay*, 73 Ill. 431; *Bliss v. Seaman*, 59 Ill. App. 236; S. C., 46 N. E. Rep. 279.

Residuary legatees may, before final settlement, contradict or surcharge a partial annual settlement made by an administrator and affirmed by the Probate Court. A receipt "in full" given on partial successive annual settlements does not estop heirs from impeaching accounts on which distribution was made. There is no element of estoppel in such receipt. *Bliss v. Seaman*, 46 N. E. Rep. 279; 59 Ill. App. 236.

An administrator is a trustee, and heirs have a right to rely on the good faith of the administrator as such. *Whitlock v. McClusky*, 91 Ill. 582.

If an administrator has any claim against an estate, or has paid money on account of his intestate in the lifetime of said intestate, he must present such claim for probate under Ch. 3, Sec. 72, R. S. *Corrington v. Corrington*, 15 Ill. App. 393; 124 Ill. 363; *Harris v. Millard*, 17 Ill. App. 512; *Millard v. Harris*, 119 Ill. 185; *May v. Leighty*, 36 Ill. App. 17; *Simms v. Guess*, 52 Ill. App. 543; *Lynch v. Divan*, 66 Wis. 490; 29 N. W. Rep. 213; *Paschall v. Hailman*, 4 Gilm. 285.

Inventories and bills of appraisement and authenticated copies thereof may be given in evidence in any suit by or against an administrator or executor, but shall not be conclusive for or against him, if any other testimony be given that the estate was really worth, or was *bona fide* sold for more or less than the appraised value thereof. R. S., Sec. 56, Chap. 3.

An inventory duly returned to the Probate Court is *prima facie* evidence of the estate's property and throws the *onus* of disproving its correctness upon the representative. 7 Am. & Eng. Enc. of Law, 307.

All records of courts must be tried and construed by the records themselves. The record in one part may contradict another part, or one part may limit or qualify or explain another part; but evidence *dehors* the record will never be

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received for the purpose. *Barnett v. Wolf*, 70 Ill. 76; *Dickison v. Dickison*, 124 Ill. 483; *Botsford v. O'Conner*, 57 Ill. 72.

Recitals in a judgment or order of a court may be contradicted and overcome by the recitals themselves. *Culver v. Phelps*, 130 Ill. 218.

It is the acknowledged duty of all courts when the claims of an administrator are preferred against an estate which he represents, that all matters pertaining to it and the administration of the estate shall be closely scrutinized; they stand in a fiduciary relation. Such is the relation an administrator bears to the estate and to all parties interested that courts can hardly be too careful in scrutinizing so that the true facts and real condition of the estate, and the acts and doings of the administrator can be readily seen and easily comprehended by those in interest. It is a lamentable fact that in some of the County Courts having jurisdiction in such matters sufficient caution is not used, and their records will show the discharge of many an administrator on final settlement who has never rendered a full account of his stewardship, or such a one as could be understood by an heir or creditor if examined within even a brief time after such settlement. We do not remember many cases where an administrator has pursued the law in stating and proving his account, or wherein a County Court had applied the rules of law to him. *Johnson, Adm., v. Gillett*, 52 Ill. 358.

The law recognizes three classes of claims against an estate :

1st. Claims of third persons filed in writing and proved by them.

2d. Claims of third persons paid by the administrator without being presented by them against the estate and for which the administrator or executor asks credit in his report; but in this case he takes upon himself the burden of proving the claim he may have paid the same as any other creditor.

3d. Claims of administrators against the estate; the last are governed by section 72, chapter 3, of the statute, and its

provisions can not be disregarded. The distinction as to these three classes of claims against an estate is clearly defined and argued in the case of *Millard v. Harris*, 119 Ill. 185.

As to his own claim against the estate he must follow section 72, and its provisions are mandatory.

An administrator is chargeable on the debit side of his report with the aggregate amount of the face of the inventory, which is *prima facie* correct but not conclusive. It is his duty to charge himself in his inventory with all debts owing by him to the estate of the deceased. As to the importance and necessity of a court having an accurate inventory, and that it is not only a question of policy but a legal duty, and that a large amount of litigation arises through inattention and inaccuracy of administrators in making inventories and keeping accounts, see *Woerner* on the Am. Law of Adm., Sections 315, 318, 509, 510.

The same author in his work, section 395, says that claims or deductions made by administrators in violation of like statutes to ours (Sec. 72, Ch. 3, R. S.) are void. *State v. Bidlingmaier*, 26 Mo. 483; *State v. Reinhardt*, 31 Mo. 95.

Where an administrator charges himself with notes due from himself to the estate, he can not credit himself therewith on the credit side of his report. The proper practice is to appoint an administrator to bring suit on the notes and prosecute the same to final judgment. In the case at bar there was no dispute or claim that the note was paid or uncollectible. It was reported as assets. *May v. Leighty*, 36 Ill. App. 17; *Simms v. Guess*, 52 Ill. App. 543.

Heirs are not competent witnesses against each other of their own motion as to matters occurring before the death of the intestate. *Burnett v. Burnett*, 38 Ill. App. 186.

The burden of proof on an appeal by an administrator is upon him to show that he has accounted for the sums inventoried by him. *Heward v. Slagle*, 52 Ill. 336.

The right of retainer existing in favor of an executor or administrator at common law as to their claims against the estate has been expressly repealed by statute in this State

as early as 1829. Paschall v. Hailman, 4 Gilm. 285; R. S. Ch. 3, Sec. 72.

GEORGE L. HOFFMAN, attorney for appellee, contended that the debt due from an estate to a claimant may be extinguished by a debt due from the same claimant to the estate. There is a mutual extinguishment of the demands of the respective parties. It is the balance only which may be due from the one to the other which constitutes the real claim for or against an estate. If the balance be against the creditor there is no entry of that fact made by the court, for balances against the estate only are to be found and entered. Peacock v. Haven, Adm., et al., 22 Ill. 25.

The County Court acting within the sphere of its jurisdiction is not an inferior court. Where it adjudicates upon the administration of an estate over which it has a general jurisdiction, as liberal intendments will be indulged in its favor as to the proceedings of the Circuit Court. Moffitt v. Moffitt, 69 Ill. 644.

It is not necessary that all the facts and circumstances which justify its action should affirmatively appear on the face of its proceedings. Probst v. Meadows, 13 Ill. 169.

To entitle an heir or legatee to relief against the order approving a report on the ground of fraud, accident or mistake it must be made evident that he has a defense upon the merits, and that such defense has been lost to him without such loss being attributable to his omission, negligence or default. Ward v. Durham, 134 Ill. 202.

Where a County Court approves an administrator's report or account, the order of approval is a distinct and complete judgment, and is *prima facie* binding upon the administrator and the heirs. Curtis v. Brooks, 71 Ill. 127.

Every item in an administrator's account rendered, is a separate claim depending upon its merits, and the judgment upon it is a separate judgment. Morgan, Adm., v. Morgan, 83 Ill. 197.

The presumption is that the evidence before the County Court showed a case authorizing the court's action. There is

no law requiring that proof should be preserved in the record, hence the presumption that there was proof upon which the judge acted. *Schnell et al. v. City of Chicago*, 38 Ill. 390.

Until the contrary is made to appear it will be presumed that the County Court had jurisdiction and proceeded regularly. *Housh v. The People, use, etc.*, 66 Ill. 178.

Claims against an estate are *ex parte* proceedings; they are conclusive upon the heirs or legatees as to personal estate. *McGarvey v. Darnall et al.*, 134 Ill. 372; *Goeppner et al. v. Leitzelmann, Adm.*, 98 Ill. 409.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Ann B. Hileman died, intestate, March 25, 1893, leaving Lucy Cowen, Naomi Emerick and Ade O. Hileman, her children, as her sole heirs at law. The latter was appointed administrator and filed an inventory, and also filed a report July 7, 1894, and another January 4, 1895, both of which were approved by the court, and upon the approval of the second, an order was entered for the distribution of the bulk of the estate, which distribution was made and reported to the court February 8, 1895, and approved. On July 2, 1895, the administrator filed a final report, showing he had fully administered said estate except as to certain worthless notes, and except \$54.06 of cash on hand; and he asked that upon distribution thereof he be discharged. The heirs had notice of the filing of said report, and Naomi Emerick filed objections, which, upon a hearing in the County Court, were overruled, and said final report approved. From that order Mrs. Emerick appealed to the Circuit Court, where there was a hearing and a like order, and she now appeals to this court.

The controversy relates to a note due from the administrator to the deceased. In his inventory the administrator set down this note, gave its date and rate of interest, and stated its amount at "\$3,900, less payments." In his first report he charged himself as follows: "1893, August 1, to balance due on Ade O. Hileman note and mortgage inventoried, less all payments and indorsements, \$1,281." In said first

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report after the ordinary statement of the account in debits and credits the administrator embodied the following statement and petition: "I, Ade O. Hileman, hereby also ask this honorable court, as administrator, to appoint some discreet person as administrator *pro tem.* for the sole and only purpose of releasing of record in the Carroll county recorder's office, a certain mortgage which secured the note of the said Ade O. Hileman, inventoried herein, which note has been fully paid by him, and he has charged himself as administrator with the balance of said note as appears in this report." The report was supported by the usual affidavit of the administrator. Said report was filed July 7, 1894, and on July 10, 1894, there was a hearing as to said report and petition, and the court entered an order showing the presenting of the said report for approval, and that the cause came on for hearing upon the said report, the exhibits and proofs, and that the court found from the evidence that said report was a just and true statement of the condition of said estate, and the report was approved. The court in the order further found from the evidence that Ade O. Hileman was indebted to the said Ann B. Hileman in her lifetime; that said debt remained unpaid at her death; that he had executed a mortgage to secure said debt; that he had paid said debt and charged himself as administrator therewith. The order then appointed an administrator *pro tem.* for the sole and only purpose of discharging said mortgage of record.

Appellant urges that by the reference to the note in the inventory, the administrator scheduled it at \$3,900, and is bound to account for that sum. This position can not be sustained. It was inventoried at "\$3,900, less payments," which was clearly a claim by the administrator that there had been payments which reduced the note below \$3,900. The heirs might have obtained from the County Court an order for a more perfect inventory, showing the precise amounts claimed to have been paid upon the note, but the inventory as it reads certainly is not an admission that the administrator was chargeable with \$3,900 on account of said note.

The administrator claimed that, beside the payments indorsed upon the back of the note, he had made certain further payments in the fall of 1892, to and on account of his mother in her lifetime, which should have been, but were not, indorsed on said note, to the amount of \$972.60. Appellant argues that as the said payments are not indorsed, the administrator should have filed his claim against the estate, had a special administrator appointed to defend, as provided by section 72 of the administration act, and that until his claim for such payments was so presented, was heard and allowed, he could not credit himself with such payments; that the County Court in acting upon said first report had no power or jurisdiction to determine how much he owed the estate on said note and how much credit he was entitled to as against the estate; and that its order in that respect was null and void as to the heirs; and that when Mrs. Emerick filed objections to his final report it became necessary for him to assume the burden and bring proof anew to establish the correctness of each item of his report, and to prove how much he had paid his mother on account of the said note.

We think this position of appellant can not be sustained. Section 60 of the administration act requires a claimant to swear that his claim is just and unpaid, after allowing all just credits. This administrator can not so swear, if, as he claims, these payments by him were payments upon the note. The balance was against him and the estate owed him nothing. The question how much was due from him to the estate on his note could not be settled by his filing a claim against the estate for all or any part of what he had paid on the note, whether indorsed or unindorsed. Payments to the deceased on a debt could not constitute claims to be put in judgment against her estate. Payment extinguishes the obligation of the debtor, but raises no obligation on the part of the creditor to refund the money so paid. *Litch v. Clinch*, 136 Ill. 410. The amount due from the administrator could have been determined by having the court appoint a special administrator to bring suit at

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law against Ade O. Hileman in some court of record upon his note, or to file a bill against him to foreclose the mortgage, but this would have entailed unnecessary expense and would have removed the question from the determination of the County Court on its probate side, and, indeed, would have taken the whole matter away from the County Court, as there was more than \$1,000 still due. The administrator was apparently ready and willing to pay all he owed. We can not hold the County Court had no power to determine the amount due from its administrator. It had jurisdiction of this administrator and of his inventories and reports, and power to require him to charge himself with whatever sums were legally chargeable against him. If any heir or interested creditor had shown to the County Court by petition or other proper mode that the note against the administrator was in fact for the principal sum of \$5,000, we can not doubt the jurisdiction of the County Court to hear proofs and compel the administrator to amend his inventory. If the administrator, by petition or otherwise, had shown to the County Court that by mistake the principal of the note stated in the inventory at \$3,900 was, in fact, only \$3,000, the County Court would have had full authority to admit an amendment of the inventory. If, on July 7, 1894, the administrator had presented to the court an amendment to the inventory as to this note, stating in detail each payment he claimed he had made thereon, in our opinion the County Court would have been acting within its ordinary probate jurisdiction in investigating said alleged payments, hearing the proofs, deciding the truth of the matter, and permitting a true amendment to be filed. It may be the County Court could have appointed an administrator *pro tem.* in such a case to protect the interests of the estate, but no statute requires it. Every time an administrator presents a report, it is possible some one might advantageously resist its approval in the interests of the heirs and creditors. In every such case the administrator may have failed to charge himself with all for which he is legally liable, or may have given himself improper credits, yet the law has

not provided for the appointment of an administrator *pro tem.* for such purposes. The county judge is expected to scrutinize such matters, ascertain the facts, and protect the interests of all. A rule which should require the appointment of an administrator *pro tem.* every time the regular administrator takes a step where he could unduly charge the estate, or unduly credit himself, would be a great burden upon the estate.

We think this matter could be properly presented to the court by the administrator's report. It often happens that an administrator pays claims which he is satisfied are correct, without the formality of their being filed and allowed by the court. He becomes a creditor of the estate as to such claims so paid. In such case he is not confined exclusively to the remedy of filing such claims in his own name against the estate, having an administrator *pro tem.* appointed and a hearing and a judgment of allowance. The usual practice, we think, is for the administrator to ask credit for such claims in his annual report, and for the court to hear evidence upon the presentation of such report for approval, and determine whether the estate is liable therefor, and give or refuse credit to the administrator accordingly, the burden being upon the administrator to prove the liability of the estate for such claim. We understand the law to be that it is proper to credit an administrator in his accounts with payments made by him upon debts owing by his intestate which were never theretofore filed and allowed as claims against the estate, if the administrator proves said demands were legally due and owing, and if there are sufficient assets to pay all debts of the class to which said claims belong. *The People v. Phelps*, 78 Ill. 147; *Millard v. Harris*, 119 Ill. 185; *Hapke v. The People*, 29 Ill. App. 546; *Lewis v. Flowree*, 42 Ill. App. 497. In *Millard v. Harris*, *supra*, the executor paid several thousand dollars of notes executed by his decedent, and which had never been presented and allowed as claims against the estate. The executor did not file them as claims, but in his report asked credit for their payment, and the Supreme

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Court held he was entitled to be so credited upon the proofs there made. A case might easily arise where an administrator having the note of the estate against a third party, the debtor would claim he had paid part of the note. If the administrator should satisfy himself of the truth of the statement and accept part payment and surrender the note, and in his report ask the approval of his action by the court, we think it not open to dispute that the court would have jurisdiction to hear the proof, determine the truth of the matter, and give the administrator proper credit. We are not to be understood as approving the practice of administrators paying claims before they are presented and allowed by the court, but the question here argued involves the jurisdiction of the County Court to hear and determine the amount due in such cases when presented only by the administrator's report.

In our opinion, therefore, the County Court had jurisdiction to hear and determine the matters presented by the administrator's first report, and its adjudication as to the amount due and owing from Ade O. Hileman to the estate was *prima facie* correct, and the heir assailing its correctness upon objections to the final report was bound to assume the burden of proof, and unless she showed by a preponderance of the evidence that the item in said first report, as to the amount due on said note, was incorrect, the judgment approving said report must stand. *Bliss v. Seaman*, 165 Ill. 422.

Appellant assumes the County Court must have based its order of July 10, 1894, upon the testimony of the administrator, who would be an incompetent witness to prove he had made payments to his mother in her lifetime. On the contrary, we must assume the County Court performed its duty, and heard only competent testimony, and that the fact that all said note had been paid to decedent except \$1,281.90 was established by proper proof.

Appellant insists the administrator was improperly permitted by the Circuit Court to testify to payments made by him to his mother. He testified in his own behalf to cer-

tain events occurring after his mother's death. As to these facts he was competent. On cross-examination appellant inquired as to the fact of his making these unindorsed payments to his mother, and proved by him most of the payments, making up the \$972.60 claimed by him. Appellant can not set up as error the questions she herself put and the answers she elicited. Whether this was proper cross-examination, or whether she made the administrator her own witness upon that subject, is immaterial, for in either case she alone brought out the testimony of the administrator as to such payments, and made it competent. There was no evidence to contradict it and the fact was thus established.

Appellant and her husband testified that there were but three indorsements on the note when the securities of deceased were examined after the funeral by appellant and husband and by W. S. Cowen, the husband of Lucy Cowen, and by Ade O. Hileman; and it is claimed that even if the indorsed payments to the amount of \$972.60 were duly proven, still a large sum remained unaccounted for. The administrator also offered proof as to the indorsements on said note. This testimony became important because the administrator was unable to produce the note at the trial in the Circuit Court. The proofs show that when the first report was prepared the note was present, and several witnesses saw it; that it was taken into the County Court when the hearing was had upon said report, and that the administrator has never since seen it. No other proof was offered by either party as to the whereabouts of said note, and there is nothing to show that the administrator concealed it or is in any way responsible for its loss and non-production. The decided preponderance of the evidence is that there were five or more indorsements on the note, and not three only, as claimed by appellant, and that the charge of \$1,281.90 in the first report was a correct statement of the amount then due on said note upon the basis of the indorsements appearing on its back and the \$972.60 of unindorsed payments claimed by the adminis-

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trator. Cowen swears that at the meeting of the heirs after the funeral, when the note was present, an estimate was made that, allowing Ade the unindorsed payments he claimed, he owed about \$1,200 on the note. The proof shows that when the first report was prepared three persons made separate computations of the amount due, and after some discrepancies were adjusted, reached the same result, \$1,281.90. A slip of paper was put in evidence by appellant containing computations made by one of said witnesses at said time, apparently showing a much larger sum due, but we think it clear that said paper contained only a part of the computation made by that witness, and that the paper containing the rest of her computation could not be found, and indeed the slip put in evidence reached the same result as the others, namely \$1,281.90, though not showing the entire process.

We should be better satisfied if the original note could have been produced in evidence with the indorsements written upon the back thereof, but we do not see that the evidence justifies us in holding the administrator responsible because of its loss, and we are not able to say that appellant sustained her objections by a preponderance of the evidence, but think on the other hand that the preponderance of the evidence is against her. The judgment of the Circuit Court will therefore be affirmed.

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174a	9

1. **APPEALS AND ERRORS**—*Alleged Errors Not Included in Assignment Not Considered.*—An assignment of errors is the pleading of the appellant or plaintiff in error, and he can not be heard on appeal, on any supposed errors in the record, not included in his assignment.

2. **EQUITY**—*When it Will Enjoin a Trespass.*—A court of equity will not interfere to prevent a trespass unless facts and circumstances are alleged from which it may be seen that irreparable injury will be the result of the act complained of, and that there is no adequate remedy at law.

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8. *SAME—Jurisdiction of, to Prevent a Multiplicity of Suits.*—To warrant the interference of equity to prevent a multiplicity of suits, there must be different persons assailing the same right, and not a mere repetition of the same trespass by the same person.

Injunction, to prevent trespasses and a multiplicity of suits. Error to the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

ROBERT DOYLE, attorney for plaintiff in error.

A bill will lie to enjoin repeated trespasses, especially where they are of a serious character. Trustees of the Congregational Church v. Stewart, 43 Ill. 85.

If there be no highway at the point in controversy that the town officers may lawfully keep open for the use of the public, then the tearing down of the fence as proposed would be a continuing trespass, or the bringing of repeated suits therefor would be a multiplicity of suits, and might cause irreparable injury and lead to breaches of the peace, and in such case equity has jurisdiction. McIntyre v. Storey, 80 Ill. 129; Landers v. Town of Whitefield, 154 Ill. 630.

KAY & KAY, attorneys for defendants in error.

"To warrant the interference of equity upon the ground of a multiplicity of suits there must be different persons assailing the same right, and not a mere repetition of the same trespass by the same person, the case being susceptible of compensation in damages. If the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed. If the right claimed affects numerous parties, equity will sometimes enjoin a continuance of the litigation because the judgment against one of the parties would not be binding on the others. But where there are continued suits between two single individuals, arising from the separate repetition of trespasses, equity will not interfere by injunction where the right has not been established by law, because a judgment in any one of the suits would be evidence in all the others. If the right has not been established at law,

Taylor v. Pearce.

the necessity of intervention does not exist." *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372; 1 High on Inj., Sec. 700; 2 Story's Eq. Jur., Sec. 857; *Poyer v. Village of Des Plaines*, 123 Ill. 111; *Pratt v. Kendig*, 128 Ill. 293.

Equity will not interfere, by injunction, to prevent a mere trespass, except to prevent irreparable injury or to prevent a multiplicity of suits. *Thornton v. Roll*, 118 Ill. 350; *Owens v. Crossett*, 105 Id. 354; *City of Chicago v. Wright*, 69 Id. 318; *Toof v. City of Decatur*, 19 Ill. App. 204; *Davis v. Hinton*, 29 Id. 328; *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372.

Before equity will assume jurisdiction in order to prevent a multiplicity of suits between the same parties, complainant's rights must be first established at law. *Poyer v. Des Plaines*, 123 Ill. 111; *Pratt v. Kendig*, 128 Id. 293; *Chicago Public Stock Exchange v. McClaughry*, 148 Id. 372; 1 High on Injunction, Sec. 700.

Where adequate relief may be had in the usual procedure at law, equity will not interfere by injunction. *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372; *Goodell v. Lassen*, 69 Id. 145; *Wells v. Lammey*, 88 Id. 174; 1 High on Injunctions, Sec. 699.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Plaintiff in error owned the north sixty acres of the north half of the southwest quarter of section eighteen, in the town of Concord, Iroquois county. Defendants in error were commissioners of highways in said town. There was a traveled highway on plaintiff in error's north line, north of her north fence, which fence she claimed had stood in one place for more than twenty years. The commissioners claimed part of the legal highway was south of her fence, and moved her fence south accordingly. She moved it back. The commissioners moved it south again. She again moved it back. This occurred a number of times. There were several arrests and trials at law growing out of these occurrences. Thereafter the commissioners gave plaintiff in

error notice that unless she removed her fence within five days, they would proceed against her for obstructing said road, and also for the daily penalty for allowing said obstructions to continue. She then filed a bill in equity to enjoin said commissioners from removing her fence, and from bringing suits concerning said fence, till a court of equity should fix the rights of the parties and of the public. A temporary injunction was granted by a master. Defendants answered and moved to dissolve the injunction. The court dissolved the injunction and dismissed the bill for want of equity, and complainant below prosecutes this writ of error from said decree.

Plaintiff in error argues certain questions of practice, based upon her claim that the court below dismissed the bill after answer filed, without setting the cause down for hearing, etc.; but we are of opinion those questions are not raised by the assignments of error, which are as follows: "1st. The court erred in dissolving said injunction, because the main allegations in said bill are not denied, but admitted in said answer. 2d. There is nothing in said record showing said road was ever open or traveled south of said fence, and the allegations that said fence has been in said place for twenty-five years are not denied, therefore the court erred in dismissing bill." These assignments are the pleadings of plaintiff in error and she can not be heard upon any other supposed errors in the record. The question whether the court below pursued the proper practice is not before us for consideration.

The bill in this case states no facts which give jurisdiction to a court of equity. It seeks to restrain repeated trespasses and a multiplicity of suits. There are no facts stated which show plaintiff in error will suffer irreparable injury by being left to her remedy at law. She states that there have been suits at law, but does not allege there has been any adjudication in her favor establishing her right at law. In the absence of the allegation, the court must assume against the pleader that she has not established her right at law; and, indeed, the proper inference against the pleader

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would seem to be that she has been defeated in the actions at law. To warrant interference on the ground of multiplicity of suits, there must be different persons assailing the same right, and not a mere repetition of the same trespass by the same person. Here there could be no suits except between the plaintiff in error and the commissioners of highways. The Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372; Commissioners of Highways v. Green, 156 Ill. 507; Harms v. Jacobs, 158 Ill. 505.

It follows that if the assignments of error truly state the condition of the record (which we can not admit), still the court did not err in dissolving the injunction, for an admission of the truth of the entire bill would not authorize the injunction; and the court did not err in dismissing the bill, for though the fence of the plaintiff in error had been in the same place for twenty-five years, still she has a complete remedy at law for its illegal removal, and therefore has no standing in equity. Decree affirmed.

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1. EQUITY PRACTICE—*Exceptions to a Master's Report Need Not Recite the Evidence.*—Exceptions to a master's report need not set out the evidence relied on, but will be held sufficient if they distinctly point out the specific matter of objection.

2. SAME—*Priority of Liens May be Adjusted on Foreclosure, Although no Cross-bills are Filed.*—Where a cross-bill filed by one of the parties to a suit to enforce a mechanic's lien, asks a sale of the property to pay a mortgage held by him, it is proper for the court to determine the priority of the liens upon the property and to decree their payment in the proper order, without any cross-bills by other lienholders, as a necessary incident to the relief sought by the mortgagee.

3. SAME—*Dismissal of Original Bill Held Not to Carry Answer with it, Where Cross-Bills Have Been Filed.*—A filed a bill against B and others to enforce a mechanic's lien; B answered claiming a prior lien, and C and D filed cross-bills setting up claims against the property. On a hearing the original bill was dismissed, and C, B and D were held to be entitled to liens in the order named. D appealed, claiming that the dis-

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missal of the original bill carried B's answer with it, and that there was no pleading to support the decree in his favor. *Held*, that the position was not well taken.

4. *SAME—Leave to File Cross-bill Not Necessary Where Defendant has Answered.*—A defendant who has answered requires no leave to file a cross-bill, but may do so even after the cause has been referred to the master.

5. *APPELLATE COURT PRACTICE—Errors Not Argued Deemed Waived.*—In order to properly present assignments of error, a plaintiff in error must argue them in his opening brief, setting forth the points, reasons and authorities he relies upon to sustain them so as to give the defendant in error a fair opportunity to know his position and to reply thereto, and all errors not so argued will be regarded as waived.

6. *SAME—An Alleged Error, Not Argued, Held Waived.*—A plaintiff in error in his opening brief copied an exception to a master's report, an order denying a motion to strike certain evidence from the report, and his exception to such order, but did not state any reasons why the evidence should not have been considered, and cited no authority to support the exception. *Held*, that the alleged error was not properly presented, and that it must be treated as waived and an argument in its support in a reply brief disregarded.

7. *SAME—An Alleged Error, Not Argued, Held Waived.*—A plaintiff in error in his opening brief stated that he excepted to the action of the court in excluding from a decree of foreclosure certain dues allowed by the master in his favor, and that such action was error, "when the mortgage and bond in terms secured the dues." This was all that was said on the subject, and the court was left to search the mortgage and bond to ascertain what provision was relied upon, and to search the abstract for the ruling complained of. *Held*, that as the attention of the court was not called to the facts in evidence upon which the question arose, nor to the reasons which would make the ruling erroneous, the alleged error should be treated as waived.

8. *MORTGAGES—Effect of Notice of the Existence of.*—Priority among mortgagees depends not only upon the date of the recording of their mortgages, but also upon the knowledge they have of the true state of facts as to the title, and of the rights and equities of those who have not fixed their priority by recording their mortgages, and a subsequent mortgagee who has notice of a prior unrecorded mortgage is affected by his knowledge of it in the same way a prior record of the mortgage would affect him.

9. *AGENCY—The Relation Held to Exist.*—The court reviews the evidence, and concludes that the person who acted for the plaintiff in error in the negotiation of the loan held by it, was the agent of the plaintiff in error for the purposes of said loan, and that notice to him of a prior unrecorded mortgage was notice to the plaintiff in error.

10. *SAME—An Undiscovered Principal Bound.*—A contract of an agent binds his principal, though the fact of the agency and the name of the principal are not disclosed until after the contract is made.

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11. **PLEADINGS—Notice of Lien May be Proved Under Pleading Claiming Priority.**—One of the parties to a suit to enforce a mechanic's lien, in his answers to the original bill and to a cross-bill filed by a mortgagee, and in a cross-bill of his own, claimed that he had a prior lien to every one else. On the trial he introduced a mortgage executed before, but recorded after the lien of the other mortgage attached to the property, and also evidence to show that the mortgage therein had notice of his rights. *Held*, that the fact that such notice was not pleaded furnished no ground of complaint, and that it could properly be proved in support of the claim of priority.

12. **EQUITY PLEADING—An Answer to a Cross-bill May Refer to the Answer to the Original Bill Although Such Bill is Dismissed.**—A reference in an answer to a cross-bill, to matters stated in an answer to the original bill, permits a reference to such answer for the purpose of supporting a decree sustaining a mechanic's lien set up in the answer to the cross-bill, although the original bill is dismissed at the hearing.

13. **MECHANIC'S LIENS—Will Attach to an Equitable Interest, and to an After-acquired Legal Title.**—A person holding a contract with the owner of real estate for a warranty deed may subject his interest to a mechanic's lien, and upon the vendee acquiring legal title during the progress of the work the lien attaches to the entire title so vested in him.

14. **SAME—A Contract Made by a Husband Held Binding on His Wife.**—In a suit to enforce a mechanic's lien against property belonging to a wife, where the contract was made by her husband, the court reviews the evidence, and holds that the contract was binding on the wife.

15. **SAME—Naming Third Persons as Debtors with the Owner of the Property.**—The fact that a person claiming a mechanic's lien, in the statement filed as required by law, named other persons with the owner of the property as the persons from whom his demand is due, does not invalidate the statement nor defeat the lien.

16. **SAME—A Lien Held to Have Priority Over a Mortgage Under Act in Force in 1893.**—Under Sec. 17 of the mechanic's lien act, in force in 1893, the mortgage of plaintiff in error could not operate upon the buildings erected or materials furnished in this case until the lien in favor of the person doing the work or furnishing the materials was satisfied.

BILL, to enforce a mechanic's lien and cross-bills to foreclose mortgages. Error to the City Court of Aurora; the Hon. RUSSELL P. GOODWIN, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

R. G. MONTONY and S. N. HOOVER, attorneys for plaintiff in error.

While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or

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imputation of notice from the agent to the principal, in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. *Am. & Eng. Ency. of Law*, Vol. I, 423; *Nat. Life Ins. Co. v. Minch*, 53 N. Y. 144; *Dillaway v. Butler*, 135 Mass. 479; *Innerarity v. Merchants National Bank*, 139 Mass. 332; *Story on Agency*, p. 140; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige, 127; *Wells v. Am. Ex. Co.*, 44 Wis. 342; *Congar v. Chicago N. W. Ry. Co.*, 24 Wis. 159; *Meacham on Agency*, Ed. 1889, Secs. 718, 719, 721, 723, 725, 729.

The contract under which the material was furnished must be with the owner of some legal or equitable interest, and that interest must exist at the time of making the contract. In this case a contract made with Francis E. Ayers will not support a lien on the property of Emma I. Ayers. *Coleman's Mechanic's Liens*, Sec. 110; *Sisson v. Holcomb*, 58 Mich. 635; *Gaddis v. Leeson et al.*, 55 Ill. 83; *Campbell v. Jacobson*, 145 Ill. 389; *Jones on Liens*, Sec. 1259; *Wendt v. Martin*, 89 Ill. 139; *Lauer v. Bandow*, 43 Wis. 563; *Jones v. Walker*, 63 N. Y. 612; *Paulsen v. Manske*, 126 Ill. 76.

If a contract was made by an agent, such agency must be established as well as averred. *Wilson v. Schuck*, 5 Ill. App. 572. In this case the claimant for a lien has averred agency but has failed to show that such agency existed. *Proctor v. Tows*, 115 Ill. 138; *McCarthy v. Carter*, 49 Ill. 53; *Franklin Savings Bank v. Taylor*, 131 Ill. 376.

The burden is on the party with whom the contract is made to ascertain who owns the property on which improvements are to be made, and the extent or the authority of the pretended agent, before entering into a contract for furnishing the material. *Proctor v. Tows*, 115 Ill. 138; *McCarthy v. Carter*, 49 Ill. 53; *Baxter v. Hutchings*, 49 Ill. 116.

It is well settled that when the credit is given to the husband on his own account, there can be no lien enforced against his wife's land. *Campbell v. Jacobson*, 145 Ill. 389;

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Little v. Vredenburg, 16 Ill. App. 189; McGraw v. Storke, 44 Ill. App. 311; Clement v. Newton, 78 Ill. 427; Wendt v. Martin, 89 Ill. 139; Geary v. Hennessy, 9 Ill. App. 17.

The enhanced value of the property by the improvements which the owner pays for, inures to the benefit of the mortgagee and not the mechanic or material man, and the improvements paid for by the money of the mortgagee, prior or subsequent to the mechanic's lien, inure to his benefit. Coleman Mechanic's Liens, Sec. 172; Clark et al. v. Moore et al., 64 Ill. 273.

Recognizing the rule to hold all improvements placed by the mortgagor on the premises as being embraced in and subject to the mortgage, is only carrying into the enforcement of the mechanic's lien law, the well known equity principle recognized in the following cases: Cable et al. v. Ellis et al., 120 Ill. 152; Ebelmessenger v. Ebelmessenger, 99 Ill. 541; Worth v. Worth, 84 Ill. 442.

ARTHUR M. BEAUPRE, attorney for defendant in error Henry Hafenrichter.

A corporation can not see or know anything except by the eyes or intelligence of its officers. Notice to the agent in a transaction must be notice to the principal, otherwise it would be in the power of any one, by employing an agent, to practice with impunity the grossest frauds. Factors' & T. Ins. Co. v. Marine Dry Dock Co., 31 La. Ann. 149; Downes v. Power, 2 Ball & Beaty, 491.

As against corporations there are peculiar and urgent reasons for a stringent enforcement of the general rule that knowledge acquired or notice received by an officer or agent, within the scope of the agency, is deemed notice to the principal, as a corporation can not see or know anything except by the intelligence of its officers. Birmingham Trust Co. v. Louisiana Nat. Bank, 99 Ala. 379.

Where the business of a company is such as to require it to be conducted through agents, notice to an agent in a matter in which he acted within the scope of his employment and in the usual course of the company's business will bind the company. Pontchartrain R. R. Co. v. Heirne, 2 La. Ann. 129.

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Proof that a person has dealt with an agent of a corporation in good faith, within the scope of his apparent authority, and relied upon this apparent authority, will render the corporation liable for the act, whether the agent exceeded his authority or not; and in order to establish a defense it must be shown not only that the act of the agent was unauthorized, but also that the party dealing with the agent had notice thereof, or that he did not rely upon the apparent powers conferred upon the agent by the corporation. 17 Am. & Eng. Ency., 158, 159.

When a duty is imposed upon and intrusted to an agent by a corporation, notice to such agent of matters falling within his line of duty, is notice to the corporation. *Sangamon Coal Min. Co. v. Wiggerhaus*, 122 Ill. 279.

The rule that notice to an agent is notice to the principal, alike includes and applies to the positive information or knowledge obtained or possessed by an agent in the transaction, and to actual or constructive notice communicated to him therein. As a general rule notice to an agent who has conducted, or who has been active as a party to a transaction, is sufficient constructive notice to his principal in the matter. *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544.

Notice of a prior incumbrance to an agent is notice to the principal. *Astor v. Wells*, 17 U. S. (4 Wheat.) 466.

Notice of an unrecorded deed to an attorney or agent is equivalent to notice to his principal. *Dickerson v. Bowers*, 42 N. J. Eq. 295.

The knowledge of the agent is knowledge of the principal. *Hoover v. Wise*, 91 U. S. 310; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige, 127; *United States Bank v. Davis*, 2 Hill, 451; *McGurk v. Metropolitan Life Insurance Co. (Conn.)*, 1 L. R. A. 563.

Where an agent comes to the knowledge of a fact while he is concerned for the principal, this operates as constructive notice to the principal himself. *Ingalls v. Morgan*, 10 N. Y. 185; *Jeffrey v. Bigelow*, 13 Wend. 518; *Norris v. Le Neve*, 3 Atk. 26; *Brotherton v. Hatt*, 2 Vern. 574; *Jennings v. Moore*, *Ibid.* 609; *Downes v. Power*, 2 Ball & B. 491.

A principal is chargeable with all the knowledge the agent possesses in the transaction of the business he has in charge. *Myers v. Mutual Life Ins. Co.*, 32 Hun, 327.

When the agent's employment is of a continuous character, and the duty rests upon him to communicate information acquired by him to his principal, his knowledge, however and wherever acquired, becomes the knowledge of the principal, and the latter is bound thereby. *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 559.

Knowledge by the defendant's agent is just as effectual to charge the defendant with such knowledge, as though he actually possessed it. *North v. House*, 6 Nat. Bank Regr. 365; *Mayer v. Hermann*, 10 Blatch. 256.

The doctrine now seems to be established that if the agent at the time of effecting a purchase has knowledge of any prior lien, trust or fraud affecting the property, his principal is affected thereby. The general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. *The Distilled Spirits*, 11 Wall. 386. Notice to the agent of a purchaser of land, of the equitable rights of a third person in the same, the agent having been employed in respect of, and participated in the transaction, is notice to the purchaser. *Jackson v. Horton*, 126 Ill. 566; *Doyle v. Teas*, 4 Scam. 202; *Rector v. Rector*, 8 Ill. 119.

On the general proposition see also, 1 Am. & Eng. Ency. of Law (2d Ed.), 1144 and cases cited in note 1.

The rule holding the principal liable for notice given to an agent, applies to agents of corporations as well as to those of other principals. *Waynesville Nat. Bank v. Irons*, 8 Fed. Rep. 1; *Farmers, etc., Bank v. Payne*, 25 Conn. 449; *Factors' and T. Ins. Co. v. Marine Dry Dock Co.*, 31 La. Ann. 149; *Nat. Security Bank v. Cushman*, 121 Mass. 490; *Cracie v. Hadley*, 99 N. Y. 131; *Wilson v. McCullough*, 23 Pa. St. 440; *Hart v. Farmers Bank*, 33 Vt. 252; *Nashville, etc., v. Elliott*, 1 Coldw. (Tenn.) 619; *Hayward v. Nat. Ins. Co.*, 52 Mo. 191; *Mihills Mfg. Co. v. Camp*, 49 Wis. 130.

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A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts; and there can be no doubt that if the agents employed by it conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principle must prevail when the principal is a corporation. *New York & N. H. R. R. v. Schuyler*, 34 N. Y. 50-51; *Ranger v. Great Western Ry. Co.*, 5 House of Lords Cases, 86.

It is the settled rule in England, in cases at law, and in America, both at law and in equity, that a corporation is responsible for the frauds of its agents when acting within the powers of the corporation, and within the scope of his agency, precisely as a natural person is. 5 *Thompson's Corp.*, Sec. 6321, and note 3 and cases cited.

A special authority to commit the fraudulent act is not necessary to make the corporation answerable for it. It is enough that the agent had authority to transact the business of the corporation, in the course of which he committed the fraud. *Ibid.*, Sec. 6322.

The association is liable to third parties for whatever the agent does or says, whatever contracts, representations or admissions he makes, whatever negligence he is guilty of, and whatever fraud or wrong he commits, provided the agent acts within the scope of his apparent authority. *Thompson on Building Associations*, Sec. 3.

A principal is liable to third persons for misfeasances, negligence and omissions of duty of his agent, leaving to him his remedy against the agent. And such liability extends to private corporations. *Story on Agency* (8th Ed.), 400, 401; *Taylor v. Taylor*, 20 Ill. 650; *Angell and Ames on Corp.* 364; *Evans' Prin. & Agent*, 470; *Prairie, etc., Building Association v. Gorrie*, 64 Ill. App. 325; *U. S. Bank v. Davis*, 2 Hill, 451.

The court will not wander at large into the evidence, and therefore either party who may wish to object before the master and except before the court, to the allowance or dis-

allowance of any item, should require the master to state the evidence and reasons upon which he allows or disallows that item. *Heffron v. Gore*, 40 Ill. App. 257; *Brown v. McKay*, 51 Ill. App. 295.

If either party is dissatisfied with the master's report, exceptions may be filed thereto; if the exceptions be to findings in fact, the evidence as to such facts should be set forth or pointed out with such directness that the court may readily find the same without searching through the entire record. *Brown v. McKay*, 51 Ill. App. 295.

Exceptions are to be regarded so far only as they are supported by the special statements of the master, or by the evidence which ought to be brought before the court by reference to the particular testimony upon which the exception relies. The chancellor would have been justified in overruling the exception to the master's conclusions upon the facts, for the reason alone that the particular evidence relied upon to sustain such exceptions was not pointed out with such definiteness that it could be easily found without searching either through the mass of evidence or unnecessarily through any part thereof. *Hodson v. Eugene Glass Co.*, 54 Ill. App. 248; *Friedman v. Schoengen*, 59 Ill. App. 376; *Wolcott v. Lake View B. & L. Ass'n*, 59 Ill. App. 415; *Springer v. Kroeschell*, 59 Ill. App. 434; *Rockwell v. O'Brien-Green Co.*, 62 Ill. App. 293.

Upon this record the court can not review the conclusions of fact, because the appellant did not take steps to have the master state upon what evidence he found the conclusions, respectively, to which objections were made and exceptions taken. *Rimmer v. O'Brien-Green Co.*, 64 Ill. App. 106; *McMannomy v. Walker*, 63 Ill. App. 259; *Prairie State L. & B. Ass'n v. Nubling*, 64 Ill. App. 330; *United Shirt & Collar Co. v. Pitzile*, 66 Ill. App. 477.

ALDRICH, WINSLOW & WORCESTER, attorneys for defendant in error Laurens Hull.

Errors which are not insisted upon in the argument must be considered abandoned. *Griffin v. Larned*, 111 Ill. 432;

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Wabash, St. L. & P. Ry. Co. v. McDougal, 113 Ill. 605; Schmit v. Devine, 63 Ill. App. 289; Cook v. Moulton, 59 Ill. App. 428.

When errors are not insisted upon by appellant in his opening brief, it is too late to present them in a reply brief. A practice of this kind would be very unfair to appellee, and would deprive the court of the benefit of any argument appellee might have made if the objection had been raised at the proper time. Schumacher v. Bell, 164 Ill. 181; Pratt v. Trustees, 93 Ill. 475; Illinois Central R. R. Co. v. Heisner, 45 Ill. App. 143.

A vendee in possession of a lot under contract of purchase has such an interest therein as will support the lien of a mechanic for work done and materials furnished prior to the forfeiture of a contract. Henderson v. Connelly, 23 Ill. App. 601; S. C., 123 Ill. 98.

The word "owner" in the statute includes the owner in equity as well as at law. It covers one who has the equitable title. Phillips on Mechanics' Liens, Secs. 67, 188; Atkins v. Little, 17 Minn. 342; Meyer Bros. Drug Co. v. Brown, 46 Kan. 543; Rollin v. Cross, 45 N. Y. 766; Springer v. Kroeschell, 161 Ill. 358.

The law is familiar that when the owner of property holds out another or allows him to appear as the owner of, or as having full power of disposition over the property, and innocent parties are thus led into dealing with such apparent owner, or person having the apparent power of disposition, they will be protected. Bigelow on Estoppel, 468; Higgins v. Ferguson, 14 Ill. 269; Donaldson v. Holmes, 23 Ill. 85; Schwartz v. Saunders, 46 Ill. 18; Bruck v. Bowermaster, 36 Ill. App. 510.

The principal may, when discovered, be held responsible, although concealed by the agent, and the agent alone trusted. The agency and defendant's liability must depend upon the fact, rather than upon plaintiff's knowledge of the fact. Story on Agency, Secs. 291-446; Dykers v. Townsend, 24 N. Y. 57; Wiener v. Whipple, 53 Wis. 298; Jessup v. Steurer, 75 N. Y. 613; Hill v. Miller, 76 N. Y. 32; Beymer

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v. Bonsall, 79 Pa. St. 298; Malcolm v. Lyon, 19 N. Y. S. 210; Benjamin on Sales, Sec. 219, note 21 and cases cited; Boland v. N. W. Fuel Co., 34 Fed. Rep. 523; Polk v. Meadow Spring D. Co., 20 Fed. Rep. 37; 1 Am. & Eng. Ency. (2d Ed.), 1139 and cases cited; Thompson v. Davenport, 3 Smith's Leading Cases (Ninth Am. Edition), 1632, and cases in the English and American notes.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

This cause originated in a bill for a mechanic's lien upon lot 3 of Burdsall and Bruce's Addition to Aurora, filed by C. Solfisburg, against Emma I. Ayers, the owner thereof, and others, for materials used in erecting a building for "flats" on said lot. Many mechanics and material men filed answers claiming liens. Plaintiff in error answered, claiming a mortgage lien for the principal sum of \$6,000, with interest and other charges superior to all other liens, and filed a cross-bill for the foreclosure of said mortgage. Henry Hafenrichter answered, claiming a mortgage lien for the principal sum of \$1,850, with interest, prior to all other liens, and filed a cross-bill for the foreclosure of said mortgage. Issues were joined, and there was reference to the master to take proofs and state an account between the parties. The master heard proofs and prepared a report, to which numerous objections were filed, and by the master overruled; exceptions were filed to the master's rulings, and there was a hearing thereon in the Circuit Court, where two exceptions were sustained, and all others were overruled, and there was a decree accordingly. By said decree Hafenrichter was given a first lien under his mortgage; Laurens Hull, trading as the Aurora Lumber Company, was given a second lien for materials furnished; plaintiff in error was given a third lien under its mortgage; numerous other mechanics and material men were given a fourth lien *pro rata*; and certain others who had asserted liens, including C. Solfisburg, were denied a lien. The association brings the case here by writ of error, and has assigned errors upon the record. No cross-errors have been assigned, and the rights of those

who received a lien fourth in order and of those who were denied a lien, are not involved. Mrs. Ayers does not question the order of the liens established by the decree. There is also no controversy between Hafenrichter and Hull. The questions are, whether Hafenrichter was entitled to priority over plaintiff in error, and whether Hull was entitled to any lien, and if so, whether he was entitled to priority over plaintiff in error.

Mrs. Ayers is the daughter of Hafenrichter, and the wife of Francis E. Ayers. J. H. Jenks, at the time of the events here litigated, was the secretary of the advisory board of plaintiff in error at Aurora. Hafenrichter received a deed of the property September 2, 1892, and afterward made some arrangement for selling it to his daughter, and she went into possession, and her husband made contracts with mechanics and material men for the erection of this building. After the work on the building had progressed some considerable time, Hafenrichter, on May 20, 1893, conveyed the lot to Mrs. Ayers for the consideration of \$2,200, and she paid him \$350 in cash, and executed with her husband a note of that date for \$1,850, due in six months after date, with interest at six per cent per annum for the balance of the purchase money, and also a mortgage upon the lot securing said note. Hafenrichter handed the mortgage to Ayers that day with directions to get it recorded, and supposed till long after that it had been so recorded. As the result of a conference between Ayers and Jenks, Ayers kept the Hafenrichter mortgage off the record till Mrs. Ayers' application for a loan from plaintiff in error had been granted, the money paid, and the mortgage to the association recorded. Jenks placed the association's mortgage on record July 8, 1893, and Ayers placed the Hafenrichter mortgage on record July 11, 1893. Thus the mortgage first executed was last recorded.

Defendants in error, Hafenrichter and Hull, in their respective briefs, argue that the objections to the master's report and exceptions to his rulings were fatally defective in not reciting, or at least pointing out, the evidence upon

which such objections and exceptions were based. The objections in question were precise, pointed out the specific matter of objection, and were one hundred and eighty-five in number. The exceptions to the master's ruling were the same in number, and were equally precise. Our Supreme Court, in *Hayes v. Hammond*, 162 Ill. 133, and *Minchrod v. Ullman*, 163 Ill. 25, settled the rule that it is not necessary to set out the evidence relied upon, and that these objections and exceptions were sufficient in form.

The assignments of error are sufficiently broad to question the action of the court upon each exception the association filed. In order to properly present these assignments, however, plaintiff in error was required to argue them in its opening brief, setting forth the points and reasons and authorities it relied upon to sustain them, so as to give defendant in error a fair opportunity to know its position and to reply thereto. Errors assigned but not argued in the opening brief of plaintiff in error, must be regarded as waived. *Wabash, St. L. & P. Ry. Co. v. McDougal*, 118 Ill. 229; *Harris v. Shebek*, 151 Ill. 287; *Schumacher v. Bell*, 164 Ill. 181; *I. C. R. R. Co. v. Heisner*, 45 Ill. App. 143. One of plaintiffs in error's exceptions was that the master erred in considering certain proof taken before him February 5 and 6, 1896. In its opening brief and argument it copied said exception, and the order of the court below denying the motion to strike said proofs out of the master's report and its exception to said order, but did not, in its opening brief, state any reasons why said evidence should not have been considered, or why it should have been stricken out, and cited no authorities to support the exception. It did nothing in its opening brief but copy the exception and the order. This gave defendants in error no chance to know the grounds on which plaintiff in error would seek to sustain the exception, and no opportunity to answer any arguments which could be urged in support of said exception. In its reply brief, plaintiff in error argues said exception at length. We think this course was not just to defendants in error, nor to this court, which is thereby deprived of any answer they

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might have made to the argument first advanced in the reply brief. We hold the failure to argue the question in the opening brief should be treated as a waiver of the supposed error. We think, however, there was no error in considering said testimony. When it was heard the proofs had not been closed. There had been much delay because of the inability of plaintiff in error to produce its witness, J. H. Jenks, for cross-examination, owing to his sickness. Plaintiff in error was present by counsel when said testimony was heard, and had an opportunity to cross-examine, and could have asked for time to produce further testimony if it desired. The matter was submitted to the court below, and we think it acted within its discretion in allowing the testimony to stand.

Plaintiff in error, in its opening brief, states that it excepted to the action of the court in excluding from the decree \$1,032 of dues allowed by the master in its favor, and that this was error, "when the mortgage and bond in terms secured the dues." Plaintiff in error devotes but a single sentence to the subject, and the words just quoted are all the argument it makes upon this assignment of error. We are left to search the mortgage and bond to ascertain upon what provisions therein the association relies, and to search the abstract to find where the ruling complained of is set forth therein. Our attention is not called to the facts in evidence upon which said question of dues is based, nor to the reasons which would make the ruling erroneous. We conclude this assignment of error should be treated as waived.

When Hafenrichter's mortgage was placed in the hands of Ayers to file it for record, he immediately consulted Jenks, and by the suggestion and procurement of the latter, Ayers withheld it from record till after the plaintiff in error's mortgage was, at a later date, executed, sent to Bloomington, accepted, returned from Bloomington with the money, and recorded. Plaintiff in error, in its opening brief, admits the acts of Jenks in this matter, in the following language: "There can be no question that Francis H. Ayers and

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J. H. Jenks colluded together to withhold Hafenrichter's mortgage from record until after the loan was made, and the mortgage to the building and loan association was filed for record." This admission was repeated in said brief, and makes a consideration of the details of the evidence on that subject unnecessary. "Subsequent purchasers who have notice of a prior unrecorded mortgage, are affected by their knowledge of it in the same way that the prior record of such mortgage would affect them." "Priority among mortgagees and grantees depends not only upon the date of their deeds and the date of their record, but also upon the knowledge they have of the true state of facts as to the title, and of the rights and equities of those who have not fixed their priority by duly recording their deeds." 1 Jones on Mortgages, Sec. 572; Marshall v. Fisk, 6 Mass. 24; Dole v. Thurlow, 12 Metc. 157; R. S., 1874, c. 30, Sec. 30. It is proved in this case that after Mrs. Ayers had made this application to plaintiff in error for a loan, and about a month and a half before the mortgage to plaintiff in error was executed and delivered, Ayers told Jenks that Mrs. Ayers owed Hafenrichter \$1,850 for purchase money of this property, and that Hafenrichter held a mortgage on the property to secure said debt. If notice to Jenks was notice to plaintiff in error, then the rule above stated applies to this case, and Hafenrichter was entitled to the prior lien he received. If notice to Jenks was not notice to plaintiff in error, then the decree was erroneous in giving Hafenrichter priority.

Plaintiff in error was organized in 1889 under our statute relative to building associations. Section 9 of article 8 of its by-laws provides that the board of directors may appoint advisory boards to such an extent and at such times as it may deem best. "They shall advise with the board of directors on important topics whenever called upon to do so, and shall furnish said directors with such information relating to the matters of the association in their particular localities as they may from time to time require." Article 12 of said by-laws provides that each advisory board shall

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consist of not less than five members, who shall elect a president, vice-president, secretary and treasurer, and may elect them from members of the association who are not members of the advisory board. Bond is required from the secretary and treasurer. Section 4 of said article requires that all monthly dues to the association shall be paid to the treasurer of the advisory board, and by him remitted to the secretary of the association at Bloomington. Section 5 of said article provides that applications for shares shall be made by or through the secretary of the advisory board, and forwarded by him to the secretary of the association. And section 6 requires members wishing loans to fill blanks required by the association, and present them to the advisory board for action, and the advisory board will forward them to the association.

Plaintiff in error organized an advisory board at Aurora. J. H. Jenks was secretary and apparently treasurer thereof during the time covered by the events here in controversy. Mrs. Ayers and her husband applied to the association through Jenks for stock and for the loan. He secured the issue of stock to Ayers, and its transfer to Mrs. Ayers when he discovered an error had been made as to the person in whose name the land was held. Jenks transmitted the application to the home office. Mrs. Ayers and her husband executed the bond and mortgage in his presence. The association sent the draft for nearly \$6,000 to Jenks; he caused Mrs. Ayers to indorse it on the back and return it to him, and he deposited it in the bank, and collected it and held the money, took out of it dues, etc., owing to the association, and paid the rest of the money out on orders of Ayers and wife as the building progressed. Although plaintiff in error put in evidence the by-laws, it also proved orally by Jenks, its witness, that his duties as secretary of the local board were to solicit stock, make loans, collect dues and interest, do the general work of the secretary and treasurer of the local board at Aurora, keep the accounts of the association at Aurora, and to collect dues, premiums and fees of the stockholders of the association at Aurora. Jenks paid off

the prior Butler mortgage previously resting on the property, recorded its release, and recorded plaintiff in error's mortgage. It was only by Jenks the association could prove what had actually been paid by Mrs. Ayers upon the dues, interest and premium. No one else connected with the association knew, except by his books and reports. Counsel for the association in interrogating Jenks as its witness, assumed he had been "acting as agent for the Inter-State Building & Loan Association in Aurora," and he so assumed in his answers. Jenks was the officer of the association who retained possession of the stock upon which the loan was made, as the bond and mortgage recited. Jenks testified "we" had been to the records to ascertain the state of the title, implying he performed that office for plaintiff in error. Plaintiff in error proved what statements Ayers made to Jenks as to the condition of the title, evidently on the theory that a statement by Ayers to Jenks that the property was clear, was a statement to the association. Marian Hatch, called as a witness by the association, testified she succeeded Jenks as agent of the association, and had in her possession the ledger kept by Jenks containing the accounts of the payments made by him out of the proceeds of this loan to material men and laborers on the building, on the orders of Mr. and Mrs. Ayers. It is evident this was a book belonging to the association in which Jenks kept its accounts at Aurora. The abstract of title was examined and passed upon by the lawyer of the association at Bloomington, and perhaps the mortgage was drawn there; but so far as appears from the evidence every other act on behalf of the association in regard to this loan, was performed by Jenks for it. Ayers and wife did not see or deal with any other officer of the association.

The argument of plaintiff in error on the subject of notice carried to its legitimate conclusion, produces the result that the association would not be bound by notice of a prior unrecorded mortgage where said notice was given to any of its officers except the lawyer whom it hired to examine abstracts of title. We do not think it could relieve itself

of the effect of notice to its officers by hiring a lawyer to advise it whether the proposed borrower had a good title. It is argued Jenks was the agent of Ayers and wife because they paid him \$25 to go to Bloomington and try to hurry up the loan, which was being delayed. Whether this \$25 more than paid his traveling expenses is not disclosed, but he evidently went because he was the agent of the association. It is claimed Jenks was agent of Mrs. Ayers because she paid him \$45 for issuing stock, but the testimony of Jenks shows the rules allowed the secretary of the advisory board a fee of one dollar for each share of stock issued, and the sixty shares issued to Mrs. Ayers entitled Jenks to a fee of \$60, but he agreed to take \$45 therefor. This, therefore, was a fee paid to him as an officer of plaintiff in error. It is insisted Jenks acted as the agent of Mrs. Ayers in paying out the proceeds of the loan to her material men and laborers on the order of her husband or herself as the building progressed. This position is untenable. A building association furnishing money to put up a building on the premises mortgaged to it, which building is usually an important part of its security for the payment of the loan, does not place the avails of the loan in the hands of the mortgagor, and leave it to his discretion whether he will put the money into the building or use it elsewhere for his other purposes. Such a course would be suicidal to the association. It requires the borrower to permit it to retain the money, and it pays out the money on the order of the borrower, and thus sees that the proceeds of the loan are applied to the building on the real estate given it as security. Jenks performed that responsible office for plaintiff in error. We hold he was an agent of the association for the purposes of this loan, and that notice to him of the prior unrecorded Hafenrichter purchase money mortgage for \$1,850 was notice to the association. To hold otherwise would, it seems to us, practically relieve plaintiff in error from the effect of the doctrine of notice as to loans made by it through its advisory boards at places other than Bloomington, where its chief officers reside. Jenks no doubt

intended by his action in this matter to give his association priority over the Hafenrichter mortgage, and was endeavoring to act for the benefit of his principal, the association. It follows that we are of opinion plaintiff in error, through its agent, Jenks, had full notice of the unrecorded mortgage.

But it is argued Hafenrichter did not in his pleadings charge notice to plaintiff in error of the unrecorded mortgage. He did, however, in his answer to the original bill and to the cross-bill of plaintiff in error, and in his own cross-bill, charge he had a lien prior to every one else, and this notice to plaintiff in error, through its agent, Jenks, is one item of the proof by which he seeks to establish that priority, and the rule is familiar that a party need not plead his evidence. It is said Hafenrichter filed his cross-bill the day after the reference to the master, without leave of court, and that it should not have been treated as included in the reference. A defendant who has answered requires no leave to file a cross-bill, and it is not too late to file a cross-bill after a reference has been made; but this cross-bill was wholly unnecessary, and the decree does not depend upon it. In each of his answers Hafenrichter set up his mortgage, and averred it was a prior lien to all others. The cross-bill of plaintiff in error asked a sale of the property to pay its mortgage. It was indispensable to that relief that the court should establish the order of liens from the evidence, and direct their payment in the order of their priority out of the proceeds of the sale. *Dillman v. Will County National Bank*, 138 Ill. 282. As the proofs stand, Hafenrichter must have been paid first out of the proceeds of a sale under the association's cross-bill, even if he had filed no cross-bill.

It is asserted Hull was not entitled to the lien given him, because Mrs. Ayers had no title when he made the contract to furnish materials for said building, and therefore his contract was not with the owner. Ayers testified the subject of the conveyance of this property from Hafenrichter to Mrs. Ayers of May 20, 1893, had been

considered by Hafenrichter and himself before that date; that along about the first of March or last of February, 1893, a deal was made by which it was understood Mrs. Ayers was to be the owner of the premises; and that the transactions between them on May 20th, the deed to Mrs. Ayers, and the note and mortgage back to Hafenrichter, were the consummation of that previous contract. The questions put to Ayers on this subject were leading, but they were not objected to, and the facts so established were not contradicted. We think this sufficient *prima facie* proof that there was a contract between the parties about the last of February or first of March, 1893, by which Hafenrichter was to convey these premises to Mrs. Ayers at the time, in the manner, and for the consideration indicated by the conveyance afterward made to her. A cottage standing on the premises was moved off, and Mrs. Ayers built a temporary structure, or shanty, on the back of the lot, and she with her husband moved into it, and took possession, and lived there until the new building was so far completed that they could move into a part of it. The evidence does not show just when she built and moved into the shanty, but it is a fair inference from the proofs that she occupied it during the entire time the flats were being erected. Hull testifies the arrangement for lumber was made in the forepart of April, 1893, and that he began delivering lumber April 13, 1893. We think the proof shows that at the time the arrangement was made with Hull for the lumber, Mrs. Ayers had a contract with Hafenrichter, the owner, for a warranty deed of the property, and that it is probable from the evidence she was then living upon the premises. *Paulsen v. Manske*, 126 Ill. 72, is conclusive that such an interest as Mrs. Ayers had would support a mechanic's lien, and inasmuch as the vendor's title might, under certain circumstances, be also subjected to a lien for labor and materials placed upon the land by the vendee (*Henderson v. Connelly*, 123 Ill. 98), we see no reason why, upon the vendee acquiring the legal title during the progress of the building, the lien should not attach to the entire title

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so vested in her. *Springer v. Kroeschell*, 161 Ill. 358; *Phoenix M. L. Ins. Co. v. Batchen*, 6 Ill. App. 621.

It is said Hull made his contract with Ayers and not with Mrs. Ayers, and therefore did not make it with the owner, and hence has no lien. The evidence on this subject is too voluminous to be repeated. By the testimony of some seventeen witnesses it was clearly proved Ayers was in fact his wife's general agent in the construction of these flats; that he made most of the contracts with mechanics and material men, disclosing his agency to some and not to others; that his wife told various parties in interest her husband was her agent in the construction of the building, and that she left everything to him in regard to the building and the payments; that she lived on the rear of the premises all the time the work was going on; that those delivering the material and doing the work saw her there daily, and frequently conversed with her about the work, and that she frequently gave orders to them in relation to the work—in regard to the fixtures, trimmings and mouldings. She examined the work and caused some changes to be made. Her directions when given were obeyed. She was present when her husband made some of the contracts. One contractor delivered most of his goods directly to her. It is clear to us that the contracts of Ayers for this building were binding upon his wife. *Bruck v. Bowermaster*, 36 Ill. App. 510. Hull did not inquire and did not know who owned the land until he had delivered about half of the lumber. He then learned of Mrs. Ayers' title and had a talk with her, and asked her if the lumber was all right, and she said it was. We think this contract of the agent bound the principal, though the fact of his agency and the name of his principal were not disclosed till later. It is the general rule that an undisclosed principal is liable when discovered.

Hull charged this account on his books to both Ayers and Mrs. Ayers, and in filing his claim for lien named *Hafenrichter* with them as the persons from whom his demand was due. We think this does not militate against the lien. His pleadings claimed he made the contract with Mrs.

Ayers, through her agent, Ayers, and the proof sustained the allegation. It may be he could also hold Ayers liable for failure to disclose his principal; it may be there were some equitable considerations which would have subjected the land to the lien in the hands of Hafenrichter, if he had not conveyed it; but the material question now under consideration is whether Hull has a lien upon the lot as against Mrs. Ayers, and we think he has. Errors in respect to matters not required to be included in the statement of lien do not invalidate the statement, nor defeat the lien. *Culver v. Schroth*, 153 Ill. 437; *Hayes v. Hammond*, 162 Ill. 133.

It is suggested that as Hull did not file a cross-bill, and as the bill of Solfsburg for a mechanic's lien was dismissed by the final decree, therefore Hull's answer to Solfsburg's bill, in which answer Hull claimed a lien, also fell, and that Hull has no pleading to support a lien in his favor. We do not think this position well taken; but Hull had other pleadings. In his answer to the cross-bill of plaintiff in error, Hull alleges "that his claim herein is for materials furnished, as set forth in his answer herein to the original bill of complaint herein, and that he is entitled to a lien upon the premises therein mentioned, and that his lien is superior to that of said loan company, and to any claim or demand whatsoever said company may have, if any, upon the premises." We think this reference to his answer to the original bill permits a reference thereto for the purpose of supporting his lien. In his answer to the Hafenrichter cross-bill he again set out his claim of lien in detail.

Plaintiff in error by its exceptions claims its mortgage should have been held prior to all other liens to an amount equal to the value of the said premises on July 1, 1893; also to an amount equal to the payments made from the proceeds of said loan or otherwise for the erection of the improvements on said premises; also to the extent to which the proceeds of its mortgage were applied in the improvement of said premises; also to the extent of the money paid by Mrs. Ayers and husband in the improvement of said premises, from whatever source derived. Hull made the arrange-

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ment with Ayers early in April, 1893. By it Hull was required to furnish all the lumber needed for the building, and at the same figures he would have given if the whole bill had been furnished for him to figure on in advance. He began furnishing lumber on the contract April 13. His lien attached to the land at the making of the contract and to the building as it progressed. The mortgage to the association was dated July 1, acknowledged July 4, and recorded July 8, 1893, and as against Hull did not become a lien till the latter date. Under section 17 of the mechanic's lien act, in force in 1893, this mortgage could not operate upon the building erected or materials furnished until the lien in favor of the person doing the work or furnishing the materials was satisfied. The association introduced proof of the value of the premises on July 11, 1893, but that was being daily increased by the addition of labor and material, and its value on July 8, 1893, was not shown. No proof was offered by plaintiff in error as to the value of the land separate from the building, nor as to the extent to which its loan as applied increased the value of the property, nor as to the extent to which labor and material furnished by others than Hull increased the value of the property, nor any proof which would enable the court, under the statute then in force, to give plaintiff in error any lien upon any part of the premises until Hull was paid.

We have considered all the errors assigned which were argued in the opening brief of plaintiff in error, and are of opinion that the decree of the court below has not thereby been successfully assailed. It will therefore be affirmed.

Henry Harnish v. Oscar Hicks.

1. EVIDENCE—*Degree of Proof Required in Civil Cases.*—In a civil case the party upon whom the burden of proving the affirmative of an issue is cast, is only required to establish it by a preponderance of the evidence. It is sufficient if the weight of evidence inclines to his side, and an instruction requiring a "clear preponderance" is erroneous.

2. *COSTS—Of an Additional Abstract.*—If there are material defects in an abstract, either of omission or misstatement, it is proper for the opposite party to file a short additional abstract, supplying the omissions and correcting the misstatements, but such defects do not justify the preparation of a new and substantially complete abstract at the cost of the appellant or plaintiff in error.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Carroll County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

HENRY MACKAY, attorney for appellant.

In this case the court said to the jury that the plaintiff need only prove his case by a preponderance of the evidence, but that the defendant must prove his defense by a clear preponderance of the evidence, thus establishing one rule of proof for plaintiff and a different, and severer rule for the defendant's defense. It told the jury that the burden of proof as to payments was on defendant, and the quantity of proof to sustain that burden was a clear preponderance. This defense of payment in full was material and vital to us, and the jury could not but be misled by this instruction. An instruction that the plaintiff or defendant must prove his case or defense by a clear preponderance of the evidence or to the "satisfaction of the jury" is erroneous and fatal. *Bitter v. Saathoff*, 98 Ill. 266; *Crabtree v. Reed*, 50 Ill. 206; *McDeed v. McDeed*, 67 Ill. 545; *Peak v. The People*, 76 Ill. 289; *Bauchwitz v. Tyman*, 11 Ill. App. 186; *Herrick v. Gary*, 83 Ill. 85; *Graves v. Colwell*, 90 Ill. 612.

Where the evidence is conflicting on material points and the merits of the case doubtful, the instructions given must be accurate and correct and each instruction must be accurate in itself or the judgment will be reversed; such a rule is essential to the ends of justice and can not be ignored. An instruction that the defendant must "satisfactorily prove that he paid the rent," is erroneous. *Bauchwitz v. Tyman*, 11 Ill. App. 186; *Ottawa, etc., Railroad Co. v. McMath*, 4 Ill. App. 356; *Buchman v. Dodds*, 6 Ill. App. 25.

RENNER & SMITH, attorneys for appellee.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Appellee was employed to work for appellant as a farm laborer, but left before the expiration of the term of his service. It was a disputed question whether he left with or without sufficient cause for so doing. He brought this suit before a justice of the peace to recover his wages for the time he labored under the contract, and recovered before the justice and again in the Circuit Court, to which appellant appealed, and from the judgment of the latter court appellant again appeals to this court. Upon the trial in the Circuit Court the two main questions in dispute were, first, what rate of wages was agreed to be paid; and second, how much had been paid by appellant to appellee thereon. There was a decided conflict in the evidence upon both said questions. Appellant claimed he had overpaid appellee. If his testimony was true, or if on the question of payment the evidence preponderated in favor of appellant, then this verdict is incorrect. The trial court while instructing that plaintiff must prove his case by a preponderance of the evidence, also, at the instance of the plaintiff, instructed the jury that "the defendant must prove all payments he claims to have made by a clear preponderance of the evidence." This was error. In a civil case the party upon whom the burden of proving the affirmative of an issue is cast, is only required to establish it by a preponderance of the evidence; it is sufficient if the weight of evidence inclines to his side. The requirement of a "clear" preponderance implies, and would be likely to be understood by the jury as requiring, something more satisfactory, convincing and decisive, than a mere inclining of the scales. *Mitchell v. Hindman*, 150 Ill. 538, and cases there cited; *Taylor v. Felsing*, 164 Ill. 331; *Cartier v. Troy Lumber Co.*, 35 Ill. App. 449; *North Chicago Street Railroad Company v. Louis*, 35 Ill. App. 477. In the case at bar, by telling the jury the plaintiff must prove the issues affirmed by him by a preponderance of the evidence, and that defendant must prove any payment he claimed by a clear preponderance, the court made it still more apparent that defendant's payments must be proved

by a greater weight of evidence than was required of the plaintiff to establish his case. As plaintiff and defendant were the only witnesses upon the question of payments, the instruction referred to was likely to be very prejudicial to defendant, and to defeat him as to all payments testified to by him and denied by plaintiff. For error in so instructing the jury, the judgment must be reversed and the cause remanded.

Appellee filed an additional abstract and moved the court to tax the cost of said additional abstract against appellant. The entire record, including all formal matters, covered but eighty-four pages. Appellant's abstract contains thirty-four printed pages. The additional abstract contains twenty-three pages, and is substantially a reproduction of the evidence. We can not approve this practice. If there are material defects in the original transcript, either of omission or misstatement, it is proper for the opposite party to file a short additional abstract, supplying the omission or correcting the misstatements, but such defects do not authorize the appellee to prepare a new and substantially complete abstract at the expense of appellant. The motion to tax the cost of the additional abstract against appellant is denied.

Reversed and remanded.

H. C. S. Fillmore v. C. F. Hodgman.

1. DECREE—*When Relief Against, Will be Granted.*—Relief will not be granted against a decree unless the complainant can impeach its justice by facts, or on grounds which he could not have used when the decree was entered, or which he was prevented from using by fraud, accident or the mistake of the opposite party, unmixed with negligence or fault on his part.

Bill, to vacate a decree. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

Fillmore v. Hodgman.

LITTLE & AVERY, attorneys for appellant.

A. J. HOPKINS, F. H. THATCHER and F. A. DOLPH, attorneys for appellee.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

For many years appellant has owned lots 10 and 11 in Fillmore's subdivision in the city of Aurora. About November 1, 1890, she entered into a certain written contract with Frank Kellogg, a contractor and builder, to repair and build an addition to her dwelling house on said premises. Kellogg performed the contract and she paid him the last payment under his contract, April 26, 1891, having paid him in all \$768.25. About a month thereafter appellee served her with written notice that he claimed a lien upon the premises for materials furnished to, and used by said Kellogg in said building. Thereafter appellee began a mechanic's lien suit in the Circuit Court of Kane County against appellant and Kellogg for a lien upon said premises, had service of summons upon defendants, and at the October term, A. D. 1891, obtained a decree for about \$150 establishing a lien upon said premises therefor. On July 5, 1892, appellant began the present suit by filing a bill in equity against appellee to procure the vacation of said decree. On September 9, 1895, she filed an amendment to said bill. Appellee demurred to said bill as amended, and the demurrer was sustained. Complainant elected to stand by her said bill of complaint, and it was dismissed by the court for want of equity at the cost of complainant. From that decree she prosecutes this appeal.

In her bill she states the facts above set forth, and that at the time she made the last payment to Kellogg she had no knowledge or suspicion that appellee or any person had any claim against said property for material that was used in her building. She also therein stated that after she was served with summons she asked Kellogg what said proceedings meant; told him she had paid him in full, and asked him if he owed appellee for any materials that had gone into her building; and that Kellogg replied that he had paid

appellee in full for everything that had been used in her building, and owed him nothing; but that he would have to hire a lawyer and go into court and show that fact; and that he would see that she should be held harmless in the premises, and there was no need for her to do anything in the matter; that she relied upon what Kellogg told her and what he agreed to do, and paid no further attention to the claim of appellee till after the entry of the decree; that Kellogg was insolvent and had left the State, so that she could have no redress from him. By her amendment she charged that in fact Kellogg had paid appellee in full for all material which went into her building, and had so notified appellee, and that appellee knew it when he began the lien suit. She further stated in the amendment that at the time said lien suit was brought there was a small balance due from Kellogg to appellee on an old standing and running account, but not on account of materials used in appellant's house; that appellee knew appellant was a widow, old and unfamiliar with legal proceedings, and therefore he advised Kellogg to keep still and say nothing about the fact that appellant had paid for all the material appellee had furnished which had been used in said building, and that he, appellee, would scare appellant so she would pay the amount of his claim against Kellogg; that Kellogg then offered to give appellee a lien on his shop for the balance he owed appellee, but appellee refused because he said he could and would get it out of appellant. The amendment further charges that to create a lien upon her property under the statute then in force appellee should have filed his claim for lien with the circuit clerk before she paid Kellogg in full, and that appellee never filed such claim and therefore never acquired said lien.

Galena & S. W. R. R. Co. v. Ennor, 116 Ill. 55, was a bill for relief against a judgment at law, while this is for relief against a decree in a mechanic's lien suit; but the general principles necessary to secure such relief against either a judgment or a decree are well stated in that case as follows: "The proof fails to show that the complainant was pre-

vented from availing himself of his defense by the fraud or act of the opposite party, unmixed with negligence or fault on his part. Under the authorities, a case is not presented for the interference of a court of equity to set aside the judgment. As said by Kent, J., in the case of *LeGuen v. Gouverneur & Kemble*, 1 Johns. Cas. 502, 'Every person is bound to take care of his own rights, and to vindicate them in due season and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him before a competent tribunal, he is forever precluded.' And again says Chancellor Kent, in *Duncan v. Lyon*, 3 Johns. Ch. 351, 'It is a settled principle that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict by facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the acts of the opposite party, unmixed with negligence or fault on his part.'" It was said in *Knoblock v. Mueller*, 123 Ill. 554, that in order to impeach a decree or obtain a rehearing of the cause because of new facts, the facts must have been discovered since the decree, must be material, and it must have been impossible for the party to produce them at the time the decree passed. The newly discovered evidence must be decisive in its character. *Aholtz v. Durfee*, 122 Ill. 286. In the case at bar the statements that appellant had a complete defense because appellee had been paid in full for materials which went into her house, and that he did not file in the office of the circuit clerk the claim essential to give him a lien, do not alone and of themselves furnish any ground for impeaching the former decree. The court in the lien suit had jurisdiction to determine those very questions. Appellant was served with summons and had a full opportunity to defend, and was acquainted with all the facts constituting her defense. Litigation would never end if a defendant duly served in a case and having a complete defense thereto, and the proof thereof at hand, may refrain from setting up said defense,

permit the case to go by default, and long afterward be allowed to file a bill to set aside the former decree or judgment because of such defense, which she well knew but did not interpose. Nor is her case aided by the mere fact that Kellogg, her co-defendant, told her he would hire a lawyer and show that appellee had been paid in full; that he would keep her harmless, and there was no need for her to do anything. Kellogg was not an agent of complainant in said lien suit, but was her co-defendant, and having interests therein not necessarily in harmony with her own. She does not claim that she saw appellee or communicated to him the fact that she had paid Kellogg in full, and that Kellogg claimed to her that he had paid appellee in full. She did not appear and employ counsel and set up the fact of payment. She did nothing prudence and diligence required of her, but trusted wholly to her co-defendant to interpose her defense, and he did not carry out his promise. All this furnished no ground for opening the former decree or requiring appellee to answer and relitigate the matters which he was required to aver and prove to entitle him to the decree he obtained. We can not extend any such privilege to silence and entire neglect. If appellee were in any way connected with said promise—if appellant had been lulled into security and silence by any act or words of appellee, an entirely different case would be presented.

The only charge tending to make a case here against appellee is that he, at some time not stated, told Kellogg to keep still and say nothing about the fact that appellant had paid for all material appellee furnished Kellogg which had been used in her building, and he would scare her into paying the amount Kellogg owed him for materials used in the construction of his shop. It is not claimed that appellee told Kellogg to keep still about the fact that Kellogg had paid appellee in full for all said materials that had gone into said building, which was the only fact appellant did not know of her own knowledge, but to keep still about the fact that appellant had paid in full for all the materials which went into her house, which fact she well knew herself. Again, Kellogg did not keep still.

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He told appellant that he had paid appellee in full for said materials. He kept nothing back. It is not charged appellee ever did see appellant or scare her, or attempt to scare her into paying for lumber used in the construction of Kellogg's shop. It is not charged Kellogg or appellee ever in any way acted upon the single remark charged against appellee, or that because of that remark Kellogg did, or refrained from doing anything whatever. That single remark made at an unknown time, not charged to have been acted upon by any one, is the sole basis for this bill to impeach the former decree for fraud, and in our judgment it does not make a case. Appellant relies upon *Biggins v. Brockman*, 63 Ill. 316, and *McGehee v. Gold*, 68 Ill. 215, but they are not in point. In the former case the judgment against which relief was sought had been obtained without personal service or actual notice. In the latter, the party complaining was sued as surety, and had no means of proving in the action at law that her principal had paid the debt. When she afterward found proof of that fact she was granted relief in equity. Here appellant was informed of the payment in full by the person who made the payment, and in time to have defended. She trusted the promise of one not a party to this record, and does not charge that appellee was in any way connected with said promise or its non-fulfillment.

The court below therefore properly sustained the demurrer to the amended bill and dismissed it for want of equity. Decree affirmed.

Frank Ferrias v. People, etc.

1. **APPEALS AND ERRORS—In Criminal Cases.**—A writ of error is the only mode provided by law by which the judgment of the trial court, in a criminal case, can be reviewed.

2. **SAME—Errors Waived by an Argument upon the Merits.**—An argument by an appellee upon their merits, of the errors assigned upon the record in a criminal case, is equivalent to a formal joinder in error, and where such an argument is made, the court may disregard an irregular attempt to bring the case up by appeal and may treat it as pending upon a writ of error.

71	559
71	490
74	304
71	559
83	64

71	559
111	*117

8. **CRUELTY TO ANIMALS**—*Failure to Provide Proper Food and Shelter.*—A defendant can not be convicted of a charge of cruelty in unlawfully killing an animal by failing to provide it with proper shelter, where the proof shows he killed it with a blow from a sledge hammer as an act of mercy.

4. **SAME**—*The Word "Unnecessarily" in Counts on Failure to Provide Food and Shelter.*—The word "unnecessarily" is a material part of the third clause of Sec. 50 of the Criminal Code, which provides that one may be guilty of cruelty to animals "by unnecessarily failing to provide any animal in his charge * * * with proper food, drink and shelter;" and a count drawn under that clause which does not contain that word or an equivalent thereto should be quashed on motion.

Information, for cruelty to animals. Appeal from the County Court of Livingston County; the Hon. CHARLES M. BARICKMAN, Judge, presiding. Heard in this court at the May term, 1897. Reversed. Opinion filed September 20, 1897.

C. C. & L. F. STRAWN, attorneys for appellant.

RAY BLASDEL, state's attorney, for appellee.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

The state's attorney filed in the court below an information charging Frank Ferrias with cruelty to animals. There were four counts in the information, and defendant moved to quash each of them, which motion being overruled he pleaded not guilty. He was tried before a jury and found guilty under the second count. He severally moved for a new trial and in arrest of judgment, which motions were denied, and he was fined and ordered committed to the county jail till fine and costs were paid. Thereupon defendant prayed an appeal to this court, which prayer the County Court granted, and he filed an appeal bond as required by said court.

A writ of error is the only mode provided by law by which the judgment of the trial court in a criminal case can be reviewed. *French v. The People*, 77 Ill. 531. Section 8 of the Appellate Court act, and section 88 of the practice act, in substance provide that appeals from and writs of error to the Circuit Courts, County Courts, etc., in all criminal cases below the grade of felony shall be taken directly to the Appellate Court, and in all criminal cases above the

grade of misdemeanor shall be taken directly to the Supreme Court. Yet our Supreme Court, after these enactments had been made, held in *Ingraham v. The People*, 94 Ill. 428, that they were not to be construed as giving an appeal in a criminal case, but were merely provisions regulating appeals and writs of error as between the Appellate and Supreme Courts, prescribing to which particular court they were to be taken, and that it was not the purpose of the legislature by said enactment to give a new right of appeal in any case in which an appeal had not before been given. That decision was followed by this court in *Anderson v. The People*, 28 Ill. App. 317. Therefore if a motion to dismiss this appeal had been interposed it would have been granted. But counsel for appellee has filed briefs arguing the case upon the merits. By that course he has waived the right to a dismissal. *Dinet v. The People, etc.*, 73 Ill. 183. Where an appellee or defendant in error argues upon their merits the errors assigned upon the record, this is equivalent to a formal joinder in error. *DeBeukelaer v. The People*, 25 Ill. App. 460. Where there has been a formal joinder in error or an equivalent thereof, the Appellate Court may disregard the irregular attempt to bring a case up by appeal, and may treat it as pending upon a writ of error. *Bonner v. The People*, 40 Ill. App. 628.

The conviction under the second count only, was an acquittal under all the other counts. Two questions are presented as to the second count: First, does it contain sufficient averments to support the judgment; and second, were its material allegations proved? The second count must have been drawn under either the first or third clause of section 50 of the criminal code. Said section, so far as material to this case, reads as follows: "Sec. 50. Whoever shall be guilty of cruelty to any animal in any of the ways mentioned in this section shall be fined not less than \$3 nor more than \$200, viz.: first, by * * * cruelly killing any animal; * * * third, by unnecessarily failing to provide any animal in his charge or custody, as owner or otherwise, with proper food, drink and shelter." The

second count charged that defendant "was guilty of cruelty to a certain animal, to wit, a pony horse, by then and there unlawfully causing the death of the said animal by then and there failing to provide the said animal with proper shelter," said animal being then and there in charge of said defendant.

It appears from the evidence defendant bought a span of ponies, had them in pasture till late in the fall, and then put them in a barn or stable he had rented, and had kept them there a considerable time before the occurrences here in question. The stable seems to have been a sufficient place of shelter, except that witnesses testified it was not kept properly cleaned out, and except that both animals were kept in the same stall, which, in the opinion of part of the witnesses, was not sufficiently wide for them. The day before this animal was killed it was outside of the stable, loose. This was in February. The pony was evidently very thin and weak, and in a poor condition, and was more than fifteen years old. While so running loose outside it got down and could not get up. There is an apparent conflict in the evidence as to whether the animal was discovered down, and defendant notified in the morning or the evening. It was evening when defendant went to her. He could not get her up. Some one put a blanket over her, and defendant left her there all night. The evidence is understood to show she was under a shed some twenty feet from the stable when she was thus left, though she seems to have moved some distance during the night in her efforts to rise. No one testifies defendant could have got the animal up, or could have got her into the stable when he so found her down. If he failed to give the animal proper food, either that night or prior to that time, that charge was made in each of the three counts under which defendant was acquitted, and not in the second count under which he was convicted. The next morning defendant found the animal still down, and killed her with a blow from a sledge hammer. If it is claimed defendant was guilty of cruelly killing said animal in violation of the first clause of said section 50, then the conviction can not be sustained, because the undisputed

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evidence is, the animal was killed by a blow from an axe, and not by a failure to give it proper shelter, as charged in the second count. Whether the animal would have died because of its enfeebled condition and lack of shelter, if the owner had not killed it, is a mere matter of conjecture. It did not die from that cause. Besides, it can not be said from the evidence that it was cruel to kill the animal. It seems instead to have been an act of mercy. If the conviction is sought to be sustained under the third clause, then the words "by then and there unlawfully causing the death of said animal," must be rejected as surplusage, for causing the death of the animal is not the offense aimed at by said third clause. With those words rejected, it is clear the court will not sustain a conviction. The offense under the third clause consists in "unnecessarily" failing to provide the animal with proper shelter. The word "unnecessarily" is omitted from the second count, and that word describes an important element of the offense. Counsel for the people seeks to have the court interpret the word "unlawfully" as an equivalent and substitute for "unnecessarily." The meanings of the two words are very different, and the charge is not that he unlawfully failed to provide shelter, but unlawfully caused the death of the animal. But if the charges were that defendant unnecessarily failed to provide the animal with proper shelter, a conviction thereof could not be sustained upon this evidence, for he had provided a stable, which was evidently sufficient shelter, whatever its other defects may have been, but he could not get the animal to it. It may be the proof would have justified the jury in finding defendant guilty of cruelty to this animal in not providing it with proper food, and in permitting it to become so weak, as charged in the other counts, but the jury have acquitted defendant of that offense. We are of opinion the second count does not charge defendant with a violation of the statute, and should therefore have been quashed, and also that the charge therein made is not supported by the proofs.

For the reasons stated the judgment will be reversed, and defendant discharged.

Edwin Beard v. O. F. Morgan and D. A. Orebaugh.

1. VERDICTS—*Not Manifestly Wrong.*—This court can not say from the evidence in this case that the jury should have reached a different conclusion, and that their determination of the disputed questions of fact was manifestly wrong, and it must stand.

2. APPEALS AND ERRORS—*Damages on Affirmance.*—This court is of the opinion, from a consideration of the voluminous abstract and careful brief filed in behalf of appellant, that this case has been contested in good faith in this court and not for delay, and that the motion for ten per cent damages should be denied.

Assumpsit, for legal services. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 30, 1897.

FRANK M. CRANGLE and W. F. PIERSON, attorneys for appellant.

MORGAN & OREBAUGH, appellees, *pro se*; HILSCHER & GOODYEAR, of counsel.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Appellant is the editor and publisher of a newspaper at Watseka, in Iroquois county. Appellees are practicing lawyers in Watseka, and in partnership. Morgan is a brother-in-law of appellant, and at one time worked on appellant's paper. Appellant became involved in a large amount of litigation because of articles published in his newspaper. He published a series of articles reflecting upon one C. H. Payson, a member of the Iroquois county bar, charging him with unprofessional conduct, after being advised by appellees the article was libelous. Payson had appellant arrested on a charge of criminal libel. Complaints of a similar character against appellant were lodged with several justices of the peace in different parts of the county. These cases were tried, and in several of them appellant was bound to the grand jury. Afterward seven indictments for criminal

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libel were found against him by the grand jury. These indictments were certified to the County Court for trial, and one of them was tried, resulting in a verdict of not guilty, and the abandonment of the remaining suits. In all these cases he was defended by appellees. While these criminal cases were pending he employed them to take steps before the Supreme Court to procure the disbarment of Payson. They prepared voluminous papers for that purpose and performed various services in connection therewith. After the abandonment of the criminal libel suits appellant dropped the disbarment proceeding. Appellant was charged with having published, in a paper at Kankakee, an article reflecting unjustly upon one J. C. Dunham, of Paxton, Illinois. Dunham sued appellant therefor in the Circuit Court of Kankakee County in an action for libel, laying damages at \$5,000. Appellees were employed by appellant in this case, and assisted in the trial, competent resident attorneys being also employed and assisting. There were continuances and a trial, and a verdict against appellant for one cent damages. Appellant had one Gregory arrested on a charge of assault and battery. Gregory was acquitted. Thereupon Gregory began a suit against appellant for false imprisonment, laying damages at \$5,000 or \$10,000. Appellees were employed and assisted in the defense of this case. There was a verdict for appellant. Appellees acted for and advised appellant in various other matters. These legal services extended over several years. Appellant paid them in all \$432.16, besides one or two other small items of credit to him. The parties had one settlement while these services were being rendered. Appellees brought this suit against appellant to recover for such legal services rendered appellant after the settlement. In their bill of particulars appellees claimed \$810. They filed an affidavit of claim with their declaration in which one of appellees swore there was \$695 still due them. Upon a jury trial appellees recovered a verdict for \$259.30, upon which verdict they had judgment, and the defendant below appeals therefrom to this court.

There were two main disputed questions of fact. The first was as follows: Appellant claimed that prior to the rendition of these services there was an arrangement between himself and appellees that he should assist appellees to get legal business, and give them the favor and influence of his newspaper, and in return therefor appellees were to make but nominal charges for legal services they rendered him; and that in compliance with said contract he sent legal business to them, gave them the favor and influence of his paper, and notified his employes on the paper and his correspondents in the different towns and villages of the county to send appellees business whenever they could, and give them their influence, and that said correspondents obeyed his instructions to a considerable extent. Appellees denied they made any such arrangement. The second disputed question of fact was, if said above stated defense failed, then what were the services of appellees reasonably worth. Appellant claimed that appellees had not been successful in many matters where more skilled lawyers would have been; that several of the more important victories were won by the other lawyers employed by appellant; that appellees made many unnecessary trips and did many unnecessary things for which they charged him; and that their charges were unreasonably high for the services rendered. Appellant's first position that appellees were to make only nominal charges was not only rebutted by the evidence of appellees, but was entirely inconsistent with appellant's conduct in paying them \$432.16 while the litigation was in progress. If there was originally such an arrangement, appellant evidently did not expect it to be applied to litigation so serious and important as that in which he afterward found himself involved. There was much contradictory evidence as to the value of, and as to what would be ordinarily reasonable charges for, such services as appellees rendered. The jury and the presiding judge were much better able than we are to determine the weight and credit which should be given to the testimony of the respective witnesses. The jury allowed appellees about one-third of the amount

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they claimed. Appellant succeeded as to about two-thirds in amount of the claims against him. We can not say from the evidence that the jury should have reached a different conclusion, and that their determination of these disputed questions of fact was manifestly wrong. We do not find in the rulings of the court upon the evidence and instructions which are here complained of, any error of sufficient importance to require a reversal.

Appellees have entered a motion asking the court in case of affirmance to assess damages against appellant under R. S. 1874, C. 33, Sec. 23, allowing damages in not exceeding ten per cent on the amount of the judgment below, where the court shall be of opinion the appeal was prosecuted for delay. With this motion is filed an affidavit that appellant's attorney made a remark to appellees implying that the appeal was for the purpose of keeping appellees out of their money as long as possible. A counter affidavit seeks to explain that the remark was merely made in jest. We are of opinion from the voluminous abstract and careful brief filed in behalf of appellant, that this case has been contested in good faith by appellant in this court, and that we ought not to grant said motion, and it is therefore denied. *Chicago, B. & Q. R. R. Co. v. Dougherty*, 110 Ill. 521. Judgment affirmed.

William A. Rowe v. Emmet Morgan.

1. *VERDICTS—On Conflicting Evidence.*—The evidence in this case was conflicting and such that a verdict either way, approved by the trial judge, should be sustained on appeal. This court is not able to say that the jury erred in finding for defendant, or that they ought to have believed plaintiff and his witnesses.

Assumpsit, on a note. Appeal from the Circuit Court of Putnam County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

FRED. S. POTTER, attorney for appellant.

R. M. BARNES, attorney for appellee.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

On August 5, 1890, appellee gave appellant his promissory note for \$500, payable to the order of appellant two years after date, with interest at eight per cent per annum, to which note was added a power of attorney to confess judgment thereon. On September 7, 1895, appellant caused judgment by confession to be entered against appellee on said note in the Circuit Court in vacation, and had execution issued. At the October term, A. D. 1896, appellee moved the court to vacate the judgment and for leave to plead. Leave was given appellee to plead, and it was ordered the judgment stand as security for the debt, but that its collection be stayed until the further order of the court. Appellee pleaded non-assumpsit, want of consideration, and accord and satisfaction, upon which pleas issues were joined, and there was a trial by jury resulting in a verdict for appellee. The court below denied appellant's motion for a new trial, and entered judgment against him for costs, from which judgment he appeals to this court.

At the trial there was a contradiction between the witnesses of the respective parties, and there was a complete disagreement between the testimony of the plaintiff and of the defendant as to the origin, consideration, and occasion of giving said note, and as to the subsequent dealings of the parties. It seems unnecessary in this opinion to set out the two histories of the transaction which the parties respectively give. If the plaintiff's evidence was true he should have recovered. If the defendant's version of the transaction was true said note never evidenced a *bona fide* debt, and defendant never owed appellant anything thereon. Each side produced evidence of many facts which were harmful to the opposite party. The defense introduced testimony tending to impeach the reputation of the plaintiff for truth and veracity, and plaintiff in rebuttal introduced evidence to sustain his reputation in that respect. The jury believed the defendant. The trial judge who saw the

witnesses, and who saw these two parties upon the stand, and heard them testify, could decide much better than we can to which one of the parties the greater confidence should be given. He approved the verdict. Counsel for appellant does not argue any objections to the rulings of the court upon the evidence. All instructions requested by appellant were given. We find no serious error in the giving of instructions for appellee. We are not able to say from the evidence that the jury erred in finding for defendant, or that they ought to have believed plaintiff and his witnesses. The evidence was such that a verdict either way, approved by the trial judge, must be sustained here. Judgment affirmed.

Traders Insurance Company v. Thomas D. Catlin.

National Fire Insurance Company v. Same.

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83	41
88	334
71	569
e92	1 44
71	569
98	1447

1. **TRIALS—Right of a Court to Limit the Number of Witnesses.**—As a general rule, a party has a right to call as many witnesses as he sees fit to and can produce in support of his contention, but in the case of expert witnesses called upon a matter collateral to the main issue, and of impeaching witnesses, and in other like cases, the trial court has the right to limit the number of witnesses to be produced, such right to be exercised within the bounds of a reasonable discretion; and in determining whether that right was properly exercised, a court of appeal will inquire whether the evidence already presented by the party was sufficient to establish his side of the issue, as it is not proper to reject further evidence where the judicial mind remains unconvinced by that already produced.

2. **SAME—Number of Witnesses Held to Have Been Improperly Limited in This Case.**—The court discusses the action of the trial court in limiting the number of witnesses upon the material issue in this case and concludes that the exercise of a sound judicial discretion required that all competent evidence should have been heard.

3. **APPELLATE COURT PRACTICE—This Court Can Not Consider Evidence Rejected in the Trial Court.**—There is no rule by which this court can lawfully take into consideration rejected testimony and base its final findings of the facts upon all the testimony, both that received and that rejected; it can only determine whether the trial court erred in its rulings upon the testimony and whether it correctly found the facts from the evidence which it admitted.

4. PROPOSITIONS OF LAW—*Should Not Decide Questions of Fact.*—A court trying a case without a jury can not be called upon in a common law action to give any proposition so framed as to constitute a decision upon a question of fact.

5. INSURANCE—*A plaintiff Need Not Show How a Fire Originated.*—The plaintiff in a suit upon a fire insurance policy to recover for a loss by fire, is not bound to show how the fire originated.

6. COSTS—*Of an Additional Abstract.*—Where an additional abstract is filed by an appellee, and the judgment is reversed and the costs of the appeal taxed against the appellee, the court will not order the cost of the additional abstract taxed against appellant even where it was properly filed.

Assumpsit, on fire insurance policies. Appeals from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

THOMAS BATES and GOODRICH, VINCENT & BRADLEY, attorneys for appellants.

SNOW & HINEBAUGH and W. C. SNOW, attorneys for appellee.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

The above entitled causes have heretofore been before this court and the Supreme Court, and are reported in 59 Ill. App. 162 and 163 Ill. 256, to which reports we here make reference for a statement of the material facts. By the opinion of the Supreme Court, the chief material question of fact left to be determined was whether the presence of the canning factory, machinery and accompanying gasoline tank caused an increase of hazard which continued to exist and affected the risk up to and at the time of the fire. The Supreme Court reversed the judgments below because the trial court excluded the testimony of expert witnesses upon the question of increased risk. The causes have been again tried without a jury, and judgments again rendered for plaintiff, from which this appeal is prosecuted by defendants.

At the last trial, defendants put in evidence the testi-

mony of eleven witnesses, of whom one testified to facts bearing on the loss from a personal acquaintance with the condition of the insured property, and ten insurance men, mechanical engineers, etc., gave expert testimony on the question of increase of hazard. Defendants then offered in evidence the depositions of fourteen other expert witnesses theretofore taken by them under a stipulation with plaintiff, which witnesses had been examined and cross-examined at great length upon the material question in the case. These depositions contained not only a hypothetical question put to each witness and his opinion given in answer thereto, but also a full examination and cross-examination upon all the matters involved in the question of increased hazard, so far as they could be testified to by witnesses who had not personally seen the buildings, machinery and appliances in question. In one or more of these depositions, a full account was given of gasoline and its qualities and characteristics, and that not as a matter of opinion, but of actual experience. Plaintiff objected to the reading of said depositions, and the objection was sustained, and defendants excepted. This record presents the question, whether the court had a discretion to reject this testimony, and if so, whether that discretion was properly exercised. There were special objections to particular questions and answers in these depositions and the court did not rule upon them, but rejected the entire depositions, and it is only the latter ruling we are called upon to consider.

In *Gray v. St. John*, 35 Ill. 222, competent parts of certain depositions had been excluded by the trial court. The Supreme Court said: "Courts have the right to limit the number of witnesses to be examined and the number of depositions to be read to prove a particular fact. When a fact is sufficiently established and is not controverted, the court may properly refuse to suffer its time to be occupied in hearing further evidence on that point." In *Union National Bank v. Baldenwick*, 45 Ill. 375, the court said: "As a general rule, evidence tending to prove an issue involved

is competent and admissible. * * * Nor is a party restricted to the proof of a fact by one witness. If the fact is not controverted, it is, no doubt, in the discretion of the court to limit the number of witnesses to prove it; but when the truth of the fact is contested it is otherwise." In *White v. Hermann*, 51 Ill. 243, our Supreme Court made these observations upon this subject: "It is also urged that the court erred in refusing to permit appellants to call more than four witnesses to prove the value of this property. It may be that on a mere collateral question, the court may have a discretionary power to limit the number of witnesses who may testify on that particular question. We are aware of no rule of practice, however, which authorizes a court to prevent a party from introducing more than four witnesses to prove the issues in the case. It is true, the statute has provided that the costs of four witnesses only, shall be taxed against the successful party, unless the court certify that a greater number were necessary, but this in no wise prevents a party from introducing more, if he is willing to risk the liability to pay their fees for attendance. It seems to imply that he may call more if he choose to risk such liability. There are few questions that witnesses are more liable to differ upon, than the value of property at a given time, especially if real estate or property not daily bought and sold in the market. This being the case, it must be necessary that the parties be permitted to call a larger number than four witnesses to prove its value. Nor are we prepared to hold in such a case, that a court has the power, on such a question, to limit the number which may be examined by either party, but the court would of course determine, in the exercise of sound discretion, whether he would certify to their necessity, and if so, to what number." In *Chicago B. & N. R. Co. v. Bowman*, 122 Ill. 595, a condemnation case, the petitioner, before defendant had offered any evidence, moved the court to limit the number of witnesses of defendant whose fees should be taxed against plaintiff. The Supreme Court quoted section 15 of the cost act, and said: "There is no inhibition upon

parties calling as many witnesses as they desire, but every party must assume the risk of having taxed against him, the fees of all such witnesses as the court may find were unnecessary. * * * How the court in advance could exercise its discretionary power of determining what witnesses were, or were not necessary to the maintenance of appellee's case is not apparent. At the conclusion of the trial, the court could act upon such a motion intelligently and fairly, but surely it could not do so before it had heard the witnesses." In *Green v. Phoenix M. L. Insurance Co.*, 134 Ill. 310, it was held, the trial court "may undoubtedly limit the number of witnesses called as experts, and in some cases for the purpose of impeachment," but that the exercise of the discretion must be reasonable and not arbitrary; and Wharton on Evidence was quoted approvingly, where that author states the rule, that when the point appears to the court to be satisfactorily established, the further calling of witnesses to prove it may be stopped, subject, however, to the right to recall, should the point be subsequently disputed. In that case, complainant summoned sixteen witnesses, eleven of whom gave testimony tending to show the insanity of the deceased, which was the material question, and the court then refused to hear further proof from the plaintiff, and rejected eighteen witnesses whom complainant then offered to prove said insanity. In reversing for error in so limiting complainant, the Supreme Court laid stress upon the fact that it was clear that when the trial judge so limited complainant, he was not satisfied that the fact of insanity was established. The court also said: "While the court might, as before said, in the exercise of a sound discretion, limit the number of witnesses called to prove any collateral fact, or any fact conceded, or which the court might regard as established, we are of opinion that the court erred in limiting the number of witnesses to be called by complainant upon this issue." *Burbans v. Village of Norwood Park*, 138 Ill. 147, was an appeal from a judgment confirming an assessment. There had been a default against appellants, which the trial court had refused to

open, but had agreed to hear witnesses as to the merits of the proposed defense, for the purpose of setting aside the default, if he should be satisfied there were such merits. Thereupon, the trial judge limited the number of witnesses he would hear on various points. The Supreme Court said it was generally within the discretion of the trial court to limit the number of witnesses on the different questions involved in such a case, provided the discretion was reasonably exercised, and that an abuse of such discretion was reversible error; but further, as the proof in that case was not being heard as of right; but as a privilege to defaulted defendants, it was subject to such conditions as the trial judge saw fit to impose. *Village of South Danville v. Jacobs*, 42 Ill. App. 533.

It would seem to follow from these decisions, that it is the general rule in this State that a party has a right to call as many witnesses as he sees fit and can produce in support of his contention, but that in the case of expert witnesses called upon a matter collateral to the main issue, and of impeaching witnesses, and in other like cases, the right of the trial court is recognized to limit the number of witnesses to be produced, such right to be exercised within the bounds of a reasonable discretion; and that in determining whether that right has been properly exercised much stress is laid upon the inquiry whether the evidence already presented by such party has been sufficient to establish his side of the issue, and that it is not proper to reject further evidence where the judicial mind remains unconvinced by that already produced. In the case at bar the rejected evidence was extremely material. The tenant of plaintiff, with his knowledge, had made changes in the condition of the insured property which were prohibited by the policies. No notice of the change had been given the insurance companies. They not only had no opportunity to cancel their policies because of the change but also no opportunity to ascertain the condition of the building after the change, nor to learn from actual inspection how the change affected the liability of the building to be destroyed by fire. Defend-

ants were therefore driven to prove their contention as to the increase of risk by the opinions of men of experience in the results which in other cases had followed like changes, and in the increased liability to fire from the presence and use of such machinery and inflammable material. The witnesses in question were testifying not upon collateral matter but upon the material issue in the case. It is clear from the record that when the trial judge had heard the eleven witnesses whose evidence was admitted for defendants, he was not thereby convinced that at the time of the fire the hazard was increased by the presence of the prohibited machinery and gasoline. We have examined the evidence on this subject sufficiently to see that it is an exceedingly close question whether the hazard was not increased at the time of the fire. It may be the rejected evidence, if heard, would have convinced the trial judge it was so increased. We think in a case so close as this, the exercise of a sound judicial discretion required that all competent evidence on this material point should be heard. We are not aware of any rule by which we could lawfully take into consideration the rejected testimony and base our final finding of the facts upon all the testimony, both that received and that rejected. We can only determine whether the court erred in its rulings upon the testimony, and whether the court correctly found the facts from the evidence which it admitted.

Defendants offered fifty-five propositions to be held as the facts and the law, and all of them, except numbers six and thirty-seven offered by the Traders Insurance Co., were findings of fact. Some consisted only of such findings, while others, after finding certain facts, propounded the legal rule claimed to be applicable thereto. A trial court can not be called upon, in a common law action, to make a finding of the facts at issue, nor can it be required to give any proposition so framed as to constitute a decision upon a question of fact. *Lord v. Board of Trade*, 163 Ill. 45; *O'Bannon v. Vigus*, 32 Ill. App. 473.

Many of these propositions were also exceedingly involved and lengthy, one covering two printed pages, and several

occupying one printed page each. We regard the presentation of these lengthy and improper recitals of fact as imposing an unnecessary burden upon the trial court and this court. Proposition No. 6 seeks to raise a question of law upon the evidence, but as we decline to consider the evidence on account of the rejection of more than one-half of defendants' testimony, we have no occasion to pass upon said proposition. If No. 37 means that as a matter of law he who sues upon a fire insurance policy to recover for a loss by fire must prove how the fire originated or be defeated, then it was properly refused. If that is not its meaning, we do not understand it.

Appellee filed an additional abstract, containing only important parts of the testimony omitted from the original abstract, and he moves the court to tax the costs thereof against appellants. We think the additional abstract was proper, and if the judgments were to be affirmed we would grant the motion. But if appellants had included this omitted matter in the original abstract, the cost thereof would have been put in judgment against appellee under the present decision, and he has but paid in advance that which would otherwise be adjudged against him. The motion is therefore denied.

For the error of the court below in refusing to admit in evidence said fourteen depositions offered by defendants, the judgment will be reversed and the cause remanded.

Clark C. Fuller v. Caroline Smith.

1. CHATTEL MORTGAGES—*Provisions of the Statute in Regard to Extension Construed.*—The statute in regard to the extension of chattel mortgages does not require that the mortgagor shall file one affidavit and the mortgagee another, nor are they required to attend personally to the filing of the affidavit but may appoint some person who shall act as the agent or attorney of both parties in the matter. All that is required is an affidavit setting forth particularly the interest the mortgagee has by virtue of such mortgage in the property mentioned therein; the amount of

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money remaining unpaid thereon; the fact that the mortgage debt has been extended; and the time when it will become due by the extension.

2. *SAME—Attempted Extension of a Chattel Mortgage Held Effectual.*—In a suit turning upon the validity of an attempted extension of a chattel mortgage the evidence showed the execution and recording of a complete affidavit containing all that the statute required, sworn to by the mortgagor, coupled with and attached to a written document signed by the agent of the mortgagee setting forth the same facts and extension. *Held* that the papers taken together constituted a substantial compliance with the statute, and that the mortgage was duly and legally extended.

3. *APPELLATE COURT PRACTICE—Errors Must be Insisted on in Opening Brief.*—An error not argued in the opening brief must be considered as waived although properly included in the assignment of errors.

Replevin, by a mortgagee against a sheriff. Appeal from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

JARVIS DINSMOOR, attorney for appellant.

H. C. WAED and A. A. WOLFERSPERGER, attorneys for appellee.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

Omar E. Fanning owned certain personal property, and on March 14, 1896, being in debt to appellee in the sum of \$731.88, he executed to her a note for said sum, bearing that date, due eight months after date, with interest at seven per cent per annum; and to secure said note executed and delivered to her a chattel mortgage upon said property, which mortgage was duly acknowledged, entered and recorded. The mortgagor retained possession of the property pursuant to a provision in the mortgage. On November 9, 1896, a few days before the mortgage and note would mature, the parties to said mortgage undertook to extend it as provided by the statute, and thereafter Fanning still remained in possession. After the date when the mortgage would have matured but for said attempted extension certain other creditors of Fanning, being of the opinion said attempted extension was invalid, caused executions upon judgments

they had recovered against Fanning to be placed in the hands of appellant, sheriff of Whiteside county, and pursuant to the directions of said creditors the sheriff seized said mortgaged property under said executions. Appellee by virtue of her mortgage replevied said property, and upon issues duly joined there was a trial without a jury and finding and judgment for appellee, from which judgment the sheriff appeals to this court.

The record requires us to determine whether there was a valid extension of the mortgage binding on third parties and other creditors. The statute with which the parties to the mortgage attempted to comply is R. S. 1874, Chap. 95, Sec. 4, as amended in 1891. It enacts that a chattel mortgage acknowledged and recorded as in that act provided shall, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or extension thereof made as there specified, such time, however, not to exceed two years from the filing of the mortgage, "unless within thirty days next preceding the expiration of such two years, or if said debt or obligation matures within such two years, then within thirty days next preceding the maturity of said debt or obligation, the mortgagor and mortgagee, his or their agent or attorney, shall file for record in the office of the recorder of deeds of the county where the original mortgage is recorded, also with the justice of the peace, or his successor, upon whose docket the same was entered, an affidavit setting forth particularly the interest which the mortgagee has by virtue of the mortgage in the property therein mentioned, and if such mortgage is for the payment of money, the amount remaining unpaid thereon, and the time when the same will become due by extension or otherwise; which affidavit shall be recorded by the said recorder, and be entered upon the docket of said justice of the peace, and thereupon the mortgage lien originally acquired shall be continued and extended for and during the term of two years from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage; provided such time

Fuller v. Smith.

shall not exceed two years from the date of filing such affidavit."

The mortgage in question had been entered upon the docket of W. H. H. Stewart, a justice of the peace, and recorded in the office of the recorder of said county. On November 9, 1896, there was filed with said justice of the peace, and on November 10th, in the office of the said recorder, a document which was entitled on the back, "Extension of Chattel Mortgage;" "Affidavits of Mortgagor and Mortgagee." The body of the paper was divided into two parts, the top part being headed, "Affidavit of Mortgagee;" and the lower part, "Affidavit of Mortgagor." The latter affidavit was duly signed and sworn to before said justice of the peace by the mortgagor. After particularly describing the mortgage, giving the names of the mortgagor and mortgagee, date of the instrument, book, page, date and place of record, the affidavit concludes as follows: "That the note secured by the said chattel mortgage matures on the 14th day of November next; that Caroline Smith has a valid lien upon the property mentioned in the said mortgage as mortgagee, to secure money loaned; that the amount remaining unpaid upon the obligation secured by said mortgage, including interest to this date, is \$765.43, and that this affidavit is made for the purpose of extending the said mortgage, and the same is extended until the 14th day of February, A. D. 1897." The affidavit at the top of the paper begins as the affidavit of the said Caroline Smith, and after setting out similar details of the mortgage, proceeds as follows: "That the note described by the said chattel mortgage matures on the 14th day of November next; that as such mortgagee she has a valid lien upon the property mentioned in said mortgage to secure money loaned by mortgagee to mortgagor; that the amount remaining unpaid upon the obligation secured by said mortgage, including interest to this date, is \$765.43, and that this affidavit is made at the request of said mortgagor for the purpose of extending the said mortgage, and the same is extended until the 14th day of February, A. D. 1897." The supposed defect

in the said last described affidavit is the signature, which is as follows: "Caroline Smith, by her agents, Krieder & Harpham (H.)." The jurat to said affidavit is as follows: "Subscribed and sworn to before me this 9th day of November, A. D. 1896, W. H. H. Stewart, justice of the peace." This was supplemented by oral evidence that John Harpham was the son-in-law of appellee; that he and A. L. Krieder were her agents in the months of October and November, 1896, and had been for more than two years last past, and transacted all her business, and that on November 9, 1896, John Harpham swore to said affidavit.

Before the adoption of the statute above recited, a debtor who had been given a chattel mortgage and was unable to pay the debt at maturity was subject to greater embarrassments and burdens than any other debtor who had given security. Any other debt could be extended by an agreement between the parties without the impairment of the security, but when a chattel mortgage came due the debt must be paid or the creditor must seize the property or lose his lien. If an extension was mutually agreeable to the parties it could not be effected except by giving a new mortgage at the risk of letting in intervening liens. The law as it then stood was calculated to force foreclosures of chattel mortgages. The change in question was made for the purpose of permitting extensions of such mortgages without impairing the lien or requiring new instruments, and without danger of letting in later liens. To enable other creditors to know the chattel mortgage had been extended, to what time it was extended, and the amount still unpaid, it was provided that an affidavit of the extension should be filed both with the justice of the peace upon whose docket the mortgage had been originally entered and in the office of the recorder of the county. The statute does not require that the mortgagor shall file one affidavit and the mortgagee another; it does not require that the affidavit shall be the personal affidavit of either the mortgagee or mortgagor. All that is required is an affidavit setting forth particularly the interest the mortgagee has by

virtue of such mortgage in the property mentioned in the mortgage, the amount of money remaining unpaid thereon, the fact that the mortgage debt has been extended, and the time when it will become due by the extension. The mortgagor and mortgagee are not required to personally attend to the filing of such affidavit. The statute assumes they may have some one person who shall act as the agent or attorney of both parties in filing such affidavit. It is obvious the mortgagee could not always make such an affidavit from personal knowledge. Loaners of money are often at a distance and act through agents. If the note and mortgage were in the hands of an agent of the mortgagee, he alone might be able to state how much had been paid and how much remained unpaid. This statute ought to receive a reasonable construction calculated to assist in the accomplishment of the objects aimed at by the amendment, and it should not be so construed that plain, common people will be unable to make a valid extension of a chattel mortgage.

The affidavit of Fanning is complete and perfect in form. By its data it fully identifies the mortgage and the debt to which it relates. It was filed in both offices at the proper time in strict compliance with the statute. It sets forth particularly the interest which the mortgagee has in the property by virtue of such mortgage; the exact amount remaining unpaid on the debt; that the affidavit is made for the purpose of extending the mortgage, and that the same is extended till February 14, 1897. It is made by the mortgagor, the only person who can extend the mortgage. It is true he can not by his own act alone extend the time when the debt shall mature. That requires the joint action of himself or his agent or attorney and of the mortgagee or her agent or attorney. But the statute does not require that there shall be filed an instrument executed by the parties extending the mortgage. What the statute requires is that an affidavit shall be filed by the mortgagor and mortgagee stating the facts concerning the extension. In this affidavit the mortgagor swears the mortgage is extended to February 14, 1897. That is an affidavit of the fact, and an

affidavit of the fact filed by both parties or under such circumstances as to be binding upon both parties to the mortgage is all the statute requires shall be placed on record. The mortgagor's affidavit might be false, but so might be the affidavit of any one else. This affidavit does not bind the mortgagee without other proof; but the paper filed in her behalf, even if so defective that perjury could not be assigned upon it, and even if so defective as not to fill the definition of an affidavit, still was signed in her name by her authorized agents, and is binding upon her, and it also states the same facts, the same amount due and that the mortgage is extended till February 14, 1897, with the further fact that said paper is made at the request of the mortgagor. There is therefore a complete affidavit of the extension containing all that the statute requires, sworn to by the mortgagor, coupled with and attached to a written document signed by the agents of the mortgagee setting forth the same facts and extension. We are of opinion that these papers taken together constituted a substantial compliance with the statute, and that said mortgage was duly and legally extended, and that appellee was therefore entitled to possession of the said property under her mortgage. We therefore consider it unnecessary for us to determine whether John Harpham could be convicted of perjury upon the affidavit sworn to by him if the same were untrue, and whether said instrument is an affidavit within the meaning of this statute.

The question whether it was necessary for appellee to make a demand before bringing this suit is raised by an assignment of error, but it is not argued in the opening brief, and is therefore waived. *Schumacher v. Bell*, 164 Ill. 181; *Harris v. Shebek*, 151 Ill. 287; *Wabash, St. L. & P. Ry. Co. v. McDougal*, 113 Ill. 603; *Illinois C. R. R. Co. v. Heisner*, 45 Ill. App. 143. Judgment affirmed.

Sechler Carriage Company v. C. E. Dryden.

1. **SALES**—*Whether Fraudulent per se Where Possession is Retained by Former Owner*—*Notice*.—A sold certain property to B, who being unable to pay for it, resold it to A, but retained possession under a contract providing for its sale upon commission. In a suit between A and an officer, holding an execution against B, *it was held* that under the circumstances, so far as they appeared from the evidence, actual notice to B's creditors was as effectual to apprise them of A's right as a change of possession would have been, and that the sale was not fraudulent *per se*.

Replevin, against a sheriff. Appeal from the Circuit Court of Mercer County; the Hon JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

BROCK & GRAHAM, attorneys for appellant.

We concede the law of this State to be that a purchaser of personal property, in order to acquire a title thereto as against creditors and *bona fide* purchasers of the vendor, without notice, must reduce the property purchased to possession before the rights of such creditor or purchaser attach thereto, but we claim that where such creditor or purchaser has actual notice of the sale, as both appellee and Robinson, the agent of Kingman & Co., had in this case, that the rights of the purchaser will be protected. O'Leary v. Bradford, 39 Ill. App. 182; Simpson Brick Press Co. v. Wormley, 61 Ill. App. 460; Huschle v. Morris, 131 Ill. 593.

BASSETT & BASSETT, attorneys for appellee.

A subsequent creditor stands in the same condition as a subsequent purchaser. In the following cases it does not appear that the creditor's debt accrued before the transfer, yet they were permitted to attack the sale. Dexter v. Parkins, 22 Ill. 144; Thompson v. Yeck, 21 Ill. 73.

And in the following cases the judgments were entered after the date of the sale, and the right to levy sustained. Rhines v. Phelps, 3 Gilman, 460; Cass v. Perkins, 23 Ill. 382; Reese v. Mitchell, 41 Ill. 367.

Where a chattel mortgage is not acknowledged and recorded, as required by statute, notice of its existence does not affect creditors and purchasers, although the mortgage may be binding between the parties. *Frank v. Miner*, 50 Ill. 444. See also *Porter v. Dement*, 35 Ill. 480; *Forest v. Tinkham*, 29 Ill. 141; *Sage v. Browning*, 51 Ill. 217; *McDowell v. Stewart*, 83 Ill. 538.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

S. A. Tornquist, of North Henderson, conducted a blacksmith shop, and in connection therewith sold farm machinery, buggies, sleighs, etc., and had been in such business for a number of years. Kingman & Co. obtained an execution against his property and the sheriff levied said execution upon certain personal property in the possession of Tornquist, and among other things upon two top buggies, one road wagon, and one sleigh. Appellant claimed to be the owner of said property, and replevied the same from the sheriff. There was the usual declaration in replevin, pleas on *non cepit*, *non detinet*, and property in Tornquist, and the lawful seizure thereof under said execution, with special replication to said last plea of property in the plaintiff and not in Tornquist. Upon a jury trial of said issues at the close of the plaintiff's testimony the court excluded the evidence and instructed the jury to find a verdict for the defendant, which was done. Motion for a new trial being overruled, and judgment for defendant rendered, the plaintiff below brings the cause to this court by appeal.

The evidence introduced by the plaintiff tended to show the following facts: Both appellant and Kingman & Co. had sold goods to Tornquist. In August, 1896, Tornquist was embarrassed financially, and on August 10, 1896, Caldwell, an agent of appellant, visited Tornquist. He had with him one note of Tornquist to appellant, and there was another unpaid note of like character not there present. Caldwell asked Tornquist to sell back to appellant what goods he had on hand that he had bought from appellant and which were not paid for. The parties found among

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his goods in his store-house the two buggies, one road wagon and one sleigh in controversy in this case, all which Tornquist had bought from appellant, and Tornquist sold them back to appellant at the invoice price, which was \$147. These goods were all standing by themselves, separate from other goods but under the same roof with them. There was about \$70 due on the note Caldwell had there present, and that was surrendered to him, and a receipt for the balance was given to Tornquist reciting that it was to be indorsed on the other note which was in the possession of the company; and said payment was afterward indorsed on said other note. Caldwell then made an arrangement with Tornquist that he should act as agent of appellant and have the exclusive sale of their goods on commission. He was not to sell on credit except to persons whom Widney, the cashier of the local bank, should approve. The usual printed and written commission contract was entered into between them, and Tornquist executed another instrument reciting that he held these articles above named in his warehouse as the property of appellant. Caldwell did not take manual possession of these articles, though they were examined and perhaps moved about some. He went away and left the goods in the possession of Tornquist for sale on commission for appellant under such written contract. A few days later, Robinson, the agent of Kingman & Co., came to Tornquist, who was also owing Kingman & Co. for goods they had sold him, and Robinson made a like arrangement with Tornquist that Tornquist should sell to Kingman & Co. the goods he had on hand which he had bought of Kingman & Co., and have them applied on the indebtedness he owed Kingman & Co. Tornquist also turned over to Robinson some notes and accounts to apply on the same indebtedness. Robinson also went away leaving the goods in the possession of Tornquist. At a later day Robinson came back and took away the goods he had so bought from Tornquist for Kingman & Co. At some time, not shown in evidence, Kingman & Co. obtained the execution in question against Tornquist, and after the events above narrated said

execution was placed in the hands of the sheriff. While Robinson was there making this arrangement with Tornquist, both when he bought the goods and when he came for them, Tornquist told him the two top buggies, road wagon and sleigh here in controversy were the property of appellant. Tornquist had no other buggies but these in his possession. When the sheriff came to levy the execution Tornquist told him that this property in question belonged to appellant. Widney, the cashier of the bank, whose duty it was to approve any notes that Tornquist might take upon the sale of said property before appellant would receive them, also told the sheriff before he levied that the property belonged to appellant. Robinson ordered a levy upon this property notwithstanding the notice, and the sheriff levied accordingly.

This being the state of the proofs, we hold that it was error for the court to refuse to submit the case to the jury. The action of the court below is sought to be sustained by the general rule that a sale of chattels unaccompanied by a change of possession is fraudulent in law and void as to creditors of the vendor. This position, however, fails to take into consideration the proof tending to show notice to Kingman & Co., the only creditors concerned. Our Supreme Court has held, as do the authorities generally, that where the transfer of personal property is founded on a good consideration, and there is no intention in fact to defraud creditors, the legal presumption of fraud created by the non-delivery of possession does not arise if the transfer or transaction is a matter of publicity or notoriety. *Lowe v. Matson*, 140 Ill. 108. Here the transaction was entirely legitimate between the parties; there was nothing to indicate any other than an honest purpose to pay an honest debt by the resale of the very goods which had created the original debt; the transaction was complete as between the parties without any delivery of possession; and there was at least a symbolical delivery of possession by the instruments executed. Added to this we have actual and explicit notice to the agent of Kingman & Co. at both of his visits to

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North Henderson, and this property twice pointed out to him as the property of appellant, and all this before the sheriff received the execution now in question. [As to Kingman & Co., the sale was open and notorious. Indeed, for all we know from this record, it may be that the indebtedness to Kingman & Co., upon which they obtained their execution, was not created till after notice of this transfer, or the execution may have been for a tort and not for the collection of a debt. If Kingman & Co. were not creditors as to the sum for which the execution was issued till after notice to their agent that appellant owned these goods, we are unable to see how the sale could have been fraudulent either in law or fact as to them. Kingman & Co. were not misled nor in any way injured by the detention of the goods in the possession of Tornquist for sale on commission. We are of opinion that under the circumstances of this case, so far as they appeared from appellant's evidence, actual notice to the creditors was as effectual to apprise them of appellant's rights as a change of possession would have been.] It was error for the court to exclude the evidence and direct a verdict for defendant, for which error the judgment is reversed and the cause remanded.

71	587
177	280

Jacob Miller et al., Ex'rs, v. Western College of Toledo.

1. **PROMISSORY NOTES**—*An Instrument Held to be a Valid Promissory Note.*—The following instrument is not testamentary in its character, but is a valid promissory note:
\$7,000.

DOVER, ILL., Dec. 9, 1887.

In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition, I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the ladies' boarding hall of said college, on or before the first day of Dec., 1910, the sum of seven thousand dollars without interest. Provided, that in the event of my death before the maturity of this note, it shall become then due.

P. O. Dover, county, Bureau, State, Ill.

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2. *CONSIDERATION—A Subscription to a School Held Binding.*—A note contained a promise to pay a certain sum to the treasurer of a college for the erection of the ladies' boarding hall of said college, and in consideration of a desire to aid the cause of Christian education. In a suit on the note, it was proved that the hall mentioned was built upon the faith of the promise contained in the note. *Held*, that the note was supported by a sufficient consideration.

3. *GIFTS—Title to Certain Funds Held Vested in Donee.*—In a suit on a note, the amount mentioned in the instrument set out below, and unpaid annuities accruing under its terms, were claimed as a set-off. *Held*, that the title to the said amount was effectually vested in the college mentioned in said instrument, and that only the unpaid annuities could be set off against the note.

The instrument was as follows :

CERTIFICATE.

In consideration of the agreement on the part of Western College, of Toledo, Iowa, that it will keep up and maintain its college, and increase its facilities for a Christian education; and in further consideration of the payment to Mrs. Mary Beatty of one hundred eighty-seven and 50-100 dollars, each and every year of her natural life, the first payment to be made one year from the date hereof; the said Mrs. Mary Beatty has deposited with the said Western College, the sum of twenty-five hundred dollars, for the benefit of, and to become and be the property of said Western College, and to be used as the board of trustees or executive committee thereof may direct.

Witness my hand, this 6th day of August, 1889.

\$187.50.

L. H. BURKIN, Treasurer.

Claim in Probate.—Appeal from the Circuit Court of Bureau County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

SCOTT & DAVIS and GEORGE S. SKINNER, attorneys for appellants.

It is well settled that the execution and delivery of one's own promissory note to another, without any valuable consideration, can not be made the subject of a gift or donation; it is merely a promise to make a gift and therefore can not be enforced, either in the lifetime of the promisor or against his estate after his death. We cite only a few of the many cases to this point. *Pope v. Dodson*, 58 Ill. 363; *Blanchard v. Williamson*, 70 Ill. 652; *Williams v. Forbes*, 114 Ill. 171; *Richardson v. Richardson et al.*, 148 Ill. 572;

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Arnold v. Franklin, 3 Ill. App. 141; Hamor v. Moore, 8 Ohio St. 239; Pearson v. Pearson, 7 Johns. (N. Y.) 26; Fink v. Cox, 18 Johns. (N. Y.) 148; Trustees, etc., v. Stewart, 1 N. Y. 582.

The provisions of the statute of wills of the State of Illinois can not be evaded by the making of a promissory note, intended as a testamentary bequest merely, and if a person makes a note or written contract, intending thereby to make a gift or donation to take effect after death, such note or contract is invalid. Olney, Adm'r, v. Howe, 89 Ill. 559; Graves v. Safford, 41 Ill. App. 659; Barnum v. Reed, 136 Ill. 388; Comer v. Comer, 120 Ill. 420; Cline et al. v. Jones et al., 111 Ill. 569; Williams v. Chamberlain, 165 Ill. 210; Forbes v. Williams, 15 Ill. App. 307; Nutt, Adm., v. Morse et al., 142 Mass. 1; Gammon Theo. Sem. v. Robbins, 128 Ind. 91; Harris v. Clark, 3 N. Y. (3 Com.) 121.

An instrument in any form, if the obvious purpose is not to take place till after the death of the maker, operates as a will. Robinson v. Brewster, 140 Ill. 649; Frew v. Clarke, 80 Pa. St. 178 and cases there cited; Habergham v. Vincent, 2 Ves. Jr. 230.

If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the lifetime of the donor, it is a testamentary disposition, good only if made and proved as a will. Basket v. Hassell, 107 U. S. 609; Williams v. Chamberlain, 165 Ill. 219; Warriner v. Rogers, 6 Moak's Eng. R. 781.

Or, if there is that which denotes an intention contrary to that appearing upon the face of the instrument, which shows that the donor did not intend it to operate at once, but that the same was to take effect at the death of the donor, then such an instrument would be a testamentary disposition and invalid, if not made in compliance with the statute of wills. Cline v. Jones, 111 Ill. 563.

A note made and delivered without consideration and intended as a gift or donation can be revoked at any time, and death revokes the promise, and no case can be found where such a promise to make a gift was ever enforced,

except upon the theory that by reason of making such promise the donor induced the donee to spend money and incur liability on the faith of such promise and that by reason thereof the donor must pay, because in good conscience and right he could not refuse after having induced others to incur liability on the faith of such promise; or in other words, such gifts are upheld on the ground of estoppel and not by reason of any good ground of consideration in the original undertaking. Pratt, Adm'x, v. Trustees, etc., 93 Ill. 475; Beach v. M. E. Church, 96 Ill. 180; Simpson Cent. College v. Tuttle, 71 Iowa, 596.

But where the note or instrument given is testamentary in its nature or intended at the time of the delivery of the same as a testamentary disposition and is void because a violation of the provisions of the statute of wills, then no act of the donee can make the same valid and binding, and even though money may have been expended and liability incurred on the faith of the giving of such an instrument, yet the same can not be enforced because, being a violation of the statute of wills and therefore void, no one would be permitted to say that they had expended money on the faith of a promise which they knew to be void and thereby recover on a contract which had no ground of consideration in the original undertaking but which if enforceable at all, must be by way of estoppel. Reimensnyder v. Gans, 110 Pa. St. 17.

The executors of the estate of Mary Beatty, deceased, are entitled as a matter of law to recover from the claimant the \$6,700 deposited with it, because the written contracts set forth on the face of the three certificates of deposit do not show an absolute executed gift *inter vivos* of the money to claimant *in præsenti*; but if it was a proposed gift it was to vest in claimant in the future and upon compliance with the conditions set forth on the face of the certificates of deposit, and a failure on the part of the claimant to comply with all the conditions to the letter as required in the contract would make such proposed gift ineffectual. Conkling v. City of Springfield, 39 Ill. 98; Porter v. Raymond, 53 N. H. 519;

4 Kent's Com., Sec. 125; Nevius v. Gourley, 95 Ill. 206; 1 Jarman on Wills (2d Am. Ed.), Sec. 798 and foot notes; Wait's Act. and Def., Vol. 7, 434, Secs. 9-10; Taylor v. Bullen, 6 Cow. (N. Y.) 627; Basket v. Hassell, 107 U. S. 602; Schouler on Per. Prop., Vol. 2, Sec. 282; Gray v. Blanchard, 8 Pick. 292; People ex rel. v. Glann, 70 Ill. 232; Thornton on Gifts, Sec. 99-100; Rosenberg v. Rosenberg, 40 Hun, 91.

The contract on the part of appellee set forth on the face of the certificates of deposit, to pay the interest or annuity on the money so deposited on a day fixed in each year of the donor's life, was an executory contract and the payment of the moneys at the time fixed was a condition precedent to the vesting of the absolute title to the \$6,700 in appellee. Wilson v. Roots, 119 Ill. 393; People ex rel. v. Glann, 70 Ill. 232; Porter v. Raymond, 53 N. H. 519; Jarman on Wills, Vol. 1 (2d Am. Ed.), Sec. 798; Moakley v. Riggs, 19 Johns. (N. Y.) 69; 3 Am. & Eng. Ency. Law, 423, Condition Precedent; Green v. Bennett, 23 Mich. 464; Schouler on Per. Prop., Vol. 2, Secs. 278 and 281.

If the right to the \$6,700 deposited, by the terms of the three certificates of deposit depended on the performance of the conditions enjoined on appellee by Mary Beatty, and appellee violated the terms of the contract by a failure to pay her the money agreed to be paid on the day fixed, she then had the right at any time after such failure to revoke the contract, and death did revoke the contract, after such failure to comply by appellee, and her executors became entitled to a return of the moneys so deposited. Pratt, Adm'x, v. Trustees, etc., 93 Ill. 475.

The gift of the \$6,700 evidenced by the three certificates of deposit did not vest the money in appellee *in præsenti*, for by annexing a condition to the proposed gift there could be no gift *in præsenti* and the donor could revoke it because the gift was not absolute and the death of Mary Beatty revoked it. Thornton on Gifts, Sec. 92; Rosenberg v. Rosenberg, 40 Hun, 91.

The fact that the \$6,700 was paid over to appellee would

make no difference. Money paid over on an unperformed condition precedent can be recovered back in an appropriate action. *Keller v. Oberreich*, 67 Wis. 232; *Schouler on Per. Prop.*, Sec. 125; *Green v. Bennett*, 23 Mich. 464.

If the payment of the annuity or interest contracted in writing to be paid to the donor on the days fixed for payment was a condition precedent to the vesting of the \$6,700 in appellee, then appellee on failure to perform, forfeited its right to the money and such forfeiture is not waived by parol assent or silent acquiescence. *Gray v. Blanchard*, 1 Pick. 292.

To constitute a valid gift *inter vivos* it requires a full and unqualified and unconditional renunciation of title by the donor and the acquisition by the donee of an absolute and unconditional title accompanied by an actual delivery of the subject-matter of the gift. The donor must surrender all his title and interest without making any conditions by means of which he may resume possession and enjoy his former estate in the property; this as a legal proposition is well settled and if the gift is evidenced by a written instrument by means of which the donor could under any circumstance be entitled to the return of the money or its equivalent, then the gift is ineffectual. *Rosenburg v. Rosenberg*, 40 Hun, 91; *Curry v. Powers*, 70 N.Y. 212; *Young v. Young*, 80 N. Y. 430; *Schouler on Per. Prop.*, Vol. 2, Sec. 81, 88, 131-134; *Selleck v. Selleck*, 107 Ill. 389; *In re Wirt*, 5 Dem. (N. Y. Sur. R.) 179; 8 Am. & Eng. Ency., 1313, 1314, Sec. 1-3; *Telford v. Patton*, 144 Ill. 627.

The rules of law require that the alleged gift be established by clear proof and that no uncertainty exist as to what was intended. The evidence of the gift here is reduced to writing and is contained in the certificates of deposit and they do not make it clear as required under the law that the donor intended to vest the title of the \$6,700 in appellee as a gift *in presenti*, whether appellee performed the conditions enjoined or not. The certificates are the only evidence of such fact and they do not make it clear as they should. *Barnum v. Reed*, 136 Ill. 388.

The three certificates of deposit evidencing the delivery of the \$6,700 do not recite that the donor made a gift of the money to appellee but they do recite that the donor had deposited the money with appellee. The term deposit in its legal significance can not be construed to mean a gift. The chief meaning of the word is that the money is committed to the custody and care of another for safe keeping for further action. *Anderson's Dictionary of Law*, 343; *Schouler on Per. Prop.*, Vol. 2, Sec. 134; *Scammon v. Kimball*, 92 U. S. 369; *Marine Bank of Chicago v. Fulton Bank*, 2 Wall. 256.

RICHARD M. SKINNER, attorney for appellee.

Where the payment is made to depend upon an event which is certain to arrive, and uncertain only in regard to the time when it will take place, the note or contract is valid. *Edwards on Bills and Promissory Notes*, Sec. 142; *Cooke v. Colehan*, *Willes* 396; 2 *Stra.* 1217.

The fact that the payment is suspended for an indefinite time does not affect the validity of the instrument, provided only it is certain to become due. *Edwards on Bills and Promissory Notes*, Sec. 142.

Notes and contracts may be made payable on any event, however remote, which must inevitably happen some time or other; thus, they may be payable on the death of a certain person. *Roffey v. Greenwell*, 2 *Perry & D.* 365; 11 *Ad. & E.* 222; or "on demand after my decease;" *Bristol v. Warner*, 19 *Conn.* 7; or "one day after date or at my death;" *Conn v. Thornton*, 46 *Ala.* 587; 1 *Randolph on Commercial Paper*, Sec. 113.

Every contributor to the funds of a corporation authorized to receive moneys and apply them to a public improvement has his recompense in his share of the public good resulting therefrom; and if by means of his contribution, or his solemn promise to pay, the body to whom he has pledged his word should encounter expense, become under legal obligations, or otherwise pursue the intent and purpose of the legislature in granting them the charter, this is a sufficient

legal consideration to support such a promise; in this respect the principles of common honesty can not be at variance with the law of the land. *Amherst Academy v. Cowls*, 6 Pick. 427.

Where a woman agreed to give \$2,500 for the purpose of discharging a \$15,000 mortgage on a church, on condition the church would raise the balance by voluntary subscriptions, and the church promised to make the effort and performed the condition, then her promise became obligatory, and the note which she gave in fulfillment thereof was based upon a sufficient consideration. *Roberts v. Cobb*, 103 N. Y. 600.

The endowment of a college is a good consideration for a note. *Johnston v. Wabash College*, 2 Ind. 555.

The accomplishment of the object for which money is subscribed to an educational institution is sufficient to support a note. *Roche v. Roanoke Classical Seminary*, 56 Ind. 198.

A subscription note is binding. *Parsonage Fund Trustees in Fryeburg v. Ripley*, 6 Me. 442.

A note executed to an educational institution as a gift is not without consideration, if upon the strength of it the institution has assumed responsibilities and incurred liabilities. *Simpson Centenary College v. Bryan*, 50 Iowa, 293.

It has been repeatedly decided that where one promises a subscription for the support or erection of a church, school, or other religious, educational or charitable institution, and money is advanced by another on the faith of such promise or subscription, an action may be maintained to recover the amount so promised or subscribed. *Vierling v. Horton*, 27 Ill. App. 263.

When a person makes a promise to pay money, to carry on some lawful project, and money is advanced, materials furnished or labor done on the strength of its payment, an action will lie to recover the amount promised. *Pryor et al. v. Cain*, 25 Ill. 292.

Where a corporation, in existence or in contemplation, expends money upon the strength of subscriptions made in

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its aid, the subscribers will be liable to an action. *Griswold v. Trustees of Peoria University*, 26 Ill. 41.

A subscription contract promising aid to some projected enterprise not unlawful, is binding on the promisor, even though he do not derive or expect to derive any benefit therefrom. The doing of work, or the expending of money, or the incurring of liability, on the faith of such subscription, is a sufficient acceptance and consideration. 1 *Parsons on Contracts*, 452; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528; *Thompson v. Supervisors*, 40 Ill. 379; *Hudson v. Green Hill Seminary*, 113 Ill. 618; *McClure v. Wilson*, 43 Ill. 356; *Trustees v. Garvey*, 53 Ill. 401; *Pratt, Adm'x, v. Trustees*, 93 Ill. 475; *Trustees Baptist Education Society v. Carter*, 72 Ill. 247.

The real consideration on which the plaintiff is entitled to recover upon a subscription is, that it has expended money, furnished materials or labor, or incurred liabilities therefor, on the faith of the undertaking of the subscriber. Any special benefit to the promisor is not necessary as a consideration. *Richelieu Hotel Co. v. International Mil. Encampment Co.*, 140 Ill. 248.

After the acceptance of the subscription, and the expenditure of considerable sums and incurring of liabilities and obligations on the faith of the same it will be too late to withdraw or revoke it. 2 *Morawetz on Corporations*, Secs. 655-689; *Thompson v. Supervisors*, 40 Ill. 379; *Richelieu Hotel Co. v. International Mil. Encampment Co.*, 140 Ill. 248.

If a day be appointed for the payment of money, and the day is to happen, or may happen before the thing which is the consideration of the money is to be performed, an action may be brought for the money before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. *Sheeren v. Moses et al.*, 84 Ill. 448.

Where an act on which an estate or right depends does not necessarily precede the vesting of the estate or right, but may accompany or follow it, the condition is a condition subsequent, not a conditional limitation. *City of Chicago v. Chicago & W. I. R. R. Co.*, 105 Ill. 73.

A court of equity, as a rule, will never lend its aid to divest an estate for a breach of a condition subsequent, but where a compensation can be made in money, it will relieve against such forfeiture, and compel the party to receive a reasonable compensation in money. *Gallaher v. Herbert*, 117 Ill. 160; 4 Kent's Com. 130; 2 Story's Eq. Jur., Secs. 13-15 *et seq.* For rule for computing such compensation see *Gallaher v. Herbert*, 117 Ill. 160.

An estate is vested, when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seizin. *Scofield et al. v. Olcott et al.*, 120 Ill. 362.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

On the 9th day of December, 1887, Mary Beatty, then residing at Dover, Ill., executed and delivered to the appellee the following instrument:

\$7,000.00.

DOVER, ILL., December 9, 1887.

In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition, I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the Ladies' Boarding Hall of said college, on or before the first day of December, 1910, the sum of seven thousand dollars, without interest. Provided, that in the event of my death before the maturity of this note, it shall become then due.

P. O., Dover; county, Bureau; State, Illinois.

MARY BEATTY.

Witness, H. H. MAYNARD, W. M. BEARDSHEAR.

On the 7th day of December, 1893, Mary Beatty died leaving a will, and on January 5, 1894, letters testamentary issued to the appellants. The above instrument was filed in the County Court for probate against the estate of the testatrix, and from there removed by appeal to the Circuit Court, which gave judgment against appellants for \$6,361, and from that judgment appellants prosecute their appeal to this court, and seek to reverse the same on three principal

grounds: First, the instrument, as is insisted by them, upon which the claim is based, is testamentary in its character, and therefore void. Second, it is not supported by a sufficient consideration; and lastly, if the instrument is valid, the defense of set-off, interposed on the trial, should have prevailed.

If it shall be determined the instrument above quoted contains the elements of a promissory note, it can not then be justly said to be of a testamentary nature. In *Dorsey v. Wolff*, 142 Ill. 593, citing numerous authorities, it was said: "Various definitions have been given of a promissory note. In general terms, it may be defined to be a written promise of one person to pay to another person therein named, or order, a fixed sum of money at all events, and at a time specified therein, or at a time which must certainly arrive."

The instrument here presented is payable on the 1st day of December, 1910, with proviso that in the event of the death of the maker before the maturity of the note, it shall then become due. Both events on the happening of which the note was to become due must certainly arrive. In *Shaw et al. v. Camp*, 61 Ill. App. 62, the note involved was, in this respect, much like the one before us. The Appellate Court of the Third District held it a valid note. It has several times been decided by the Supreme Court, that a deed delivered, and not to take effect until after the death of the grantor, was a valid deed. (*Harshbarger v. Carroll*, 163 Ill. 636, and cases cited.) No reason can be perceived why the instrument here does not fall strictly within the principles of the decisions to which reference has been made, and it follows, therefore, it is not of a testamentary nature.

It is alleged by counsel for appellants, as a second reason against the validity of the note, that it is not supported by a sufficient consideration. From the evidence it can scarcely be doubted, after the note was delivered, and upon the faith of its promise, the ladies' boarding hall mentioned in the contract was built by appellee, and named, in honor of the donor, the Mary Beatty Hall. In *Richelieu Hotel Co. v.*

International Mil. Encampment Co., 140 Ill. 248, citing *Hudson v. Green Hill Seminary*, 113 Ill. 618, it was said: "The real consideration upon which the plaintiff is entitled to recover in said case, is, that it has expended money, furnished materials, or bestowed labor, upon the faith of the promise in writing, and not any special benefit derived, or expected to be derived by the promisor from the corporation." Applying this doctrine to the facts before us, it is clearly to be seen the note is well supported by a sufficient consideration.

It now remains to be determined if appellants' defense of set-off should have prevailed to a greater extent than it did. It appears from the evidence after the deceased had executed and delivered the note, she was induced by persons representing the appellee, to advance to the appellee certain sums of money, from time to time, which were evidenced by three separate certificates, one for \$3,500, dated November 16, 1888; one for \$700, dated April 4, 1889, and one for \$2,500, dated August 6, 1889, and delivered to and accepted by the deceased, and with indorsements thereon. Said certificates with indorsements are as follows:

CERTIFICATE.

In consideration of the agreement on the part of Western College of Toledo, Iowa, that it will keep up and maintain its college and increase its facilities for a Christian education; and in further consideration of the payment to Mrs. Mary Beatty of one hundred eighty-seven and 50-100 dollars each and every year of her natural life, the first payment to be made one year from the date hereof, the said Mrs. Mary Beatty has deposited with the said Western College the sum of twenty-five hundred dollars, for the benefit of, and to become and be the property of said Western College, and to be used as the board of trustees, or executive committee thereof may direct.

Witness my hand this 6th day of August, 1889.

\$187.50.

L. H. BURKIN, Treasurer.

And on the back thereof appears the following, to wit:

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" We hereby guarantee the payment of the within annuity.
L. H. Bufkin, M. S. Drury.
Aug. 6, 1890, paid one year's annuity.
Oct. 9, 1891, " " " " "

CERTIFICATE.

In consideration of the agreement on the part of Western College of Toledo, Iowa, that it will keep up and maintain its college, and increase its facilities for a Christian education; and in further consideration of the payment to Mrs. Mary Beatty of fifty-two and 50-100 dollars each and every year of her natural life, the first payment to be made one year from the date hereof; the said Mrs. Mary Beatty has deposited with the said Western College the sum of seven hundred dollars, for the benefit of, and to become and be the property of said Western College, and to be used as the board of trustees or executive committee thereof may direct.

Witness my hand this 4th day of April, 1889.

\$52.50.

L. H. BUFKIN, Treasurer.

And on the back thereof appears as follows:

" We guarantee the payment of the within annuity. L.
H. Bufkin, M. S. Drury.

April 4, 1890, paid within year's annuity.

April 4, 1891, paid on the within year's annuity. Mary
Beatty.

April 15, 1892, paid one year's annuity."

CERTIFICATE.

In consideration of the agreement on the part of Western College of Toledo, Iowa, that it will keep up and maintain its college and increase its facilities for a Christian education; and in further consideration of the payment to Mrs. Mary Beatty of two hundred sixty-two and 50-100 dollars each and every year of her natural life, the first payment to be made one year from the date hereof; the said Mrs. Mary Beatty has deposited with the said Western College the sum of thirty-five hundred dollars, for the benefit of, and to become and be the property of said Western College, and to be used as the board of trustees or executive committee thereof may direct.

Witness my hand this 16th day of November, 1888.

\$3,500.

L. H. BUFKIN, Treasurer.

And on the back thereof appears the following, to wit:

"We hereby guarantee the payment of the annuity to Mrs. Mary Beatty according to the terms of the within certificate. L. H. Bufkin, M. S. Drury, W. M. Beardshear.

Received on the within \$262.50, December 5, 1889. Mary Beatty.

Received on the within \$262.50, December 5, 1890. Mary Beatty.

Paid on the within \$262.50, by note dated November 16, 1891."

Counsel for appellants contend the \$6,700 represented by these certificates is an unexecuted gift by the deceased to the appellee, the title thereto remaining in the donor at the time of her death, and especially so, for the additional reason that default had been made in the payment of the interest or annuities accruing thereon, and therefore the executors were entitled to set off the principal as well as the unpaid interest, or annuities. We can not perceive any force to this contention. The certificates expressly provide the money represented by them respectively, is for the benefit and to be the property of the appellee, and to be used as the board of trustees or executive committee might direct. The deceased accepted the certificates and thereby bound herself by the terms thereof, and is given by them only a right of action against the appellee for the annuities, in case of non-payment. The title to the money is effectually vested in the college, and to be used by it, thereby placing it beyond her power to reclaim. The numerous authorities cited by appellants' counsel have no application to the question as we understand it.

After the allowance of interest to the appellee on the \$7,000 note from December 7, 1893, the time it fell due, it will be found appellants have received credit for all unpaid annuities, including the note and interest that was given for arrears, and therefore the amount of the judgment is not excessive.

Clark v. First Nat. Bk. of Earlville.

Complaint is further made by counsel for appellants of the instructions to the jury by the trial court, and of instructions refused. We have examined the instructions, given and refused, of which complaint is made, and find the action of the court in those respects is in harmony with our own views of the same question. Finding no error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

DIBELL, J., took no part.

**Joel W. Clark, for use, etc., v. First National Bank
of Earlville.**

1. **AMENDMENTS**—*Of the Records of a Case Not Pending Before the Court.*—A court has no power to make an order in a case, allowing an amendment of the record in another case not pending before it. The propriety of allowing the proposed amendment can only arise on motion made in the cause to which the record sought to be amended belongs, after notice to the party whose rights are to be affected.

2. **PROPOSITIONS OF LAW**—*Held Inapplicable and Properly Refused.*—This court decides that the trial court properly refused to hold the propositions of law presented by appellant, as such propositions had no application to the issue on which the case was disposed of.

3. **GARNISHMENT**—*When it May Issue.*—To warrant the issuing of garnishee process, there must be a return upon an execution against the judgment debtor, stating either in terms or in substance that no property is found.

Garnishment.—Appeal from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

CHAS. F. PRESTON and CLYDE SMITH, attorneys for appellant.

Where the fact was that the sheriff had made demand seven days before he returned the writ, and was unable to find property to levy on, the court say that the plaintiff "had a right to have the sheriff return the execution unsatisfied" (Illinois M. I. Co. v. Graham, 55 Ill. App. 266, cit-

ing *Russell v. Chicago T. and S. Bank*, 139 Ill. 538), and that his return is sufficient to support a *ca. sa.*, for "The facts exist which show an exhaustion of the legal remedies, and such facts are not modified or affected by the direction of the creditor's attorney to return the execution unsatisfied." *Huntington v. Metzger*, 158 Ill. 272.

"A return of an execution unsatisfied means that the defendant has no property which the sheriff can levy upon; it is sufficient to ground a creditor's bill upon. * * * The return is evidence, because of a legal presumption that the sheriff did his duty upon process in his hands." *Springer v. Puttkammer*, 58 Ill. App. 675.

It is sufficient to sustain a creditor's bill or to authorize a suit against an indorser. *Alexander v. Tams*, 13 Ill. 221; *Durand v. Gray*, 129 Ill. 9; *Thompson v. Yates*, 61 Ill. App. 262.

"The statute relative to the filing of creditor's bills and that concerning the issue of garnishee process upon the return of an execution 'No property found,' are so similar that the rule as to the return of execution in one case is to be applied to the other," and so, too, as to the return required to support a *ca. sa.* *Dunderdale v. Westinghouse Electric Co.*, 51 Ill. App. 407; *Huntington v. Metzger*, 51 Ill. App. 222; S. C., 158 Ill. 272.

The application to amend was made upon proper proof, and in apt time. *Spellmyer et al. v. Gaff*, 112 Ill. 29; *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 86 Ill. 587.

And the deputy who made the return was the proper person to amend it. *Wilson v. Greathouse*, 1 Scam. 174; *Noleman v. Weil*, 72 Ill. 502; *O'Conner v. Wilson*, 57 Ill. 226.

Nor is it objectionable that the sheriff's term of office had expired. *Johnson v. Donnell*, 15 Ill. 100; *Morris v. Trustees*, 15 Ill. 270; *Stull v. Hance*, 62 Ill. 52.

The general rule is that the return is amendable. S. & C., Vol. 1, 375, *et seq.*

And the return, as amended, will relate back. *Wilton Mfg. Co. v. Butler*, 34 Me. 431; *Welsh v. Joy*, 13 Pick.

477; *Freeman v. Paul*, 3 Me. 260; *Cogswell v. Mason*, 9 N. H. 48.

The case at bar falls within the general rule.

Conceding, for the purpose of argument, under this second head of our brief, that the return as originally made did not show jurisdiction, we still contend that the lack of jurisdiction was only in appearance, and not in substance. The case is analogous to that of a sheriff's return of summons, or other first process, where from the return the service appears to be insufficient to give the court jurisdiction of the person. Yet the record may be amended to speak the truth. *Turney v. Organ*, 16 Ill. 43; *Dunn v. Rodgers et al.*, 43 Ill. 260; *Toledo, P. & W. Ry. Co. v. Butler*, 53 Ill. 323; *Montgomery v. Brown et al.*, 2 Gilm. 581.

Or where the declaration fails to show jurisdiction in the court, it may be amended. *Wakefield v. Goudy*, 3 Scam. 133.

For the indorsement of return is not the fact, but the evidence of it. *Spellmyer v. Gaff*, 112 Ill. 29.

BREWER & STRAWN, attorneys for appellee.

An indorsement on an execution by a sheriff that he returns the execution not satisfied by order of the plaintiff's attorney, is insufficient to give the court jurisdiction in garnishment. *Michigan C. R. R. v. Keohane*, 31 Ill. 144; *Dunderdale v. Westinghouse Electric Co.*, 51 Ill. App. 407; *Pecos I. & I. Co. v. Olson*, 63 Ill. App. 313.

A return "No property found," and a proper affidavit are essential to give the court jurisdiction. 1 S. & C. An. St., Ch. 62, Sec. 1; *Chanute v. Martin*, 25 Ill. 63; *Gibbon v. Bryan*, 3 Ill. App. 298; *Pierce v. Wade*, 19 Ill. App. 185.

Parol evidence is not admissible to contradict or modify the return of an officer. *Wilson v. Greathouse*, 1 Scam. 174; *Botsford v. O'Conner*, 57 Ill. 72; *O'Conner v. Wilson*, 57 Ill. 226; *Harris v. Lester*, 80 Ill. 307; *Coughran v. Gutcheus*, 18 Ill. 390; *Rivard v. Gardner*, 39 Ill. 125; *Huntington v. Metzger*, 158 Ill. 272.

A ruling on a motion addressed to the discretion of the

court will not be reviewed by an Appellate Court except for an abuse of that discretion. The amendment of a return by an officer after the lapse of a considerable time is addressed to the discretion of the court. *Windett v. Hamilton*, 52 Ill. 180; *Thatcher v. Miller*, 13 Mass. 270; *Hovey v. Wait*, 17 Pick. 196; *Scruggs v. Scruggs*, 46 Mo. 271; *Freeman v. Paul*, 3 Me. 260; 2 *Freeman on Executions*, Sec. 360.

The public may act on an official record, and an amendment will not be permitted to the detriment of the rights of third parties acquired on the strength of such records. *Am. Exch. Nat. Bank v. Moxley*, 50 Ill. App. 314; *Wooters v. Joseph*, 137 Ill. 113; *McCormick v. Wheeler*, 36 Ill. 114; *Church v. English*, 81 Ill. 442; *Emerson v. Upton*, 9 Pick. 167; 2 *Freeman on Executions*, Sec. 360.

The affidavit does not confer jurisdiction because it does not state that the execution was returned by the proper officer, *i. e.*, the sheriff of the county where the debtor resided. *McKinney v. Snider*, 116 Ind. 160; *Pouder v. Tate*, 111 Ind. 148; *Stickney v. Little*, 29 Ill. 315; *Durand & Co. v. Gray*, *Kingman & Collins*, 129 Ill. 9; *Rood on Garnishment*, Sec. 251.

And the amendment of the return is not the doing of a new act, but the furnishing evidence of an act done. *Morris v. Trustees*, 15 Ill. 270; *Dunn v. Rodgers et al.*, 43 Ill. 260; *Howell v. Albany C. Ins. Co.*, 62 Ill. 50.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was a proceeding in garnishment by the appellant against appellee, First National Bank of Earlville, as garnishee. Judgment was rendered June 7, 1888, in the Circuit Court of Lee County, in favor of Charles Pierce, against Joel W. Clark, for \$1,048.28, and on the same day an execution was issued upon said judgment against the defendant therein. The execution went into the hands of the sheriff on the 9th day of June, 1888, and according to the indorsement thereon made by the sheriff, was served on the defendant therein, on the 18th day of June, 1888, and demand made. On the 15th day of September, 1888, the

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record shows the execution was filed with the clerk of the court, and after that date the following further indorsement appears to have been made upon the execution: "I return this execution the 27th day of September, 1888, not satisfied, by order of the plaintiff's attorney. (Signed) W. H. Woodyalt, sheriff."

The garnishee proceedings in the case presented, are based upon the judgment, execution and return above mentioned.

On the trial, and without notice to Joel W. Clark, the execution debtor, the executors of the plaintiff in execution, and the beneficiaries in the proceeding, moved the court, and in this case, for leave of the court to the sheriff, who had made said return, then long out of office, to amend the return indorsed on said execution, in order that such return might show, in substance, that on the said 25th day of September, 1888, the said Joel W. Clark, defendant in execution, had no property in his county whereof he could make the amount of said execution, or any part thereof; which motion the court denied, and refused to grant leave to amend said return. The garnishee, appellee here, filed a special plea denying that execution had been returned "No property found," to which the court sustained a demurrer. After the order sustaining said demurrer, the garnishee answered the interrogatories, and therein also set up, in substance, the same matter of its special plea denying the return of execution "No property found." On the final hearing the court entered an order dismissing the proceedings for want of jurisdiction, from which the appellants prosecute this appeal, assigning for error the refusal of the court to grant leave to the sheriff to amend the return of execution; the refusal of the court to hold certain propositions as law in the decision of the case, and that the court erred in dismissing the case for want of jurisdiction.

We shall consider these assignments of error in the order stated. We are of the opinion the court did not err in refusing leave to amend the return, for the reason the record of the original cause did not rest in this, and therefore

the court had no power, in this proceeding, to make an order affecting the record in another cause, at that time not pending before it. Had such motion been made in the cause where the record of the return properly belonged, after notice to the execution debtor whose rights were to be affected, and the record of such motion made in that cause, and between the parties thereto, being brought to this court, the question would then, and only then, arise for decision.

Concerning the error assigned, that the court refused to hold certain propositions of law, we think the appellants were not in any manner injured by the refusal, as they had no application to the issue on which the case was disposed of. Therefore the court properly refused all propositions of law, of which complaint is made.

We come now to the consideration of the propriety of the court's action in dismissing the case for want of jurisdiction. The statute (Sec. 1, Chap. 62, Starr & Curtis) provides that when a judgment shall be rendered by any court of record, and an execution against the defendant in such judgment shall be returned by the proper officers, "No property found," on affidavit, etc., it shall be lawful to issue summons, etc.

It was held in *Chanute et al. v. Martin*, 25 Ill. 63: "The obvious design of the law was only to authorize such proceeding after a failure, where a reasonable effort has been made in good faith to collect the money by the ordinary process of the law. It was only intended to be allowed when there is no property subject to execution, or when it can not be found by reasonable efforts of the officer and plaintiff in execution." And in *Mich. Cen. R. R. Co. v. Keohane*, 31 Ill. 144: "A party seeking the benefits of this provision must bring himself, substantially, within its provisions. * * * An execution must have been issued and returned 'no property found,' to warrant the issuing of garnishee process, under this section. This is a statutory mode of obtaining execution after the means known to the common law have been employed and failed. And it can only be resorted to after the requirements of the statute have been complied with, as conditions to issuing the process,

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Unless the return, in terms or substance, states that 'no property is found,' it is insufficient." In the respect last above described it is likened unto a creditor's bill. *Dunderdale v. Westinghouse Electric Co.*, 51 Ill. App. 407.

In the light of the statute and the decisions under it, there seems little reason for the contention that the return here presented is sufficient to entitle the process to issue. It is wanting in the essential element of the legal requirement that no property of the defendant was found. He may have had unlimited property and the return of the officer be also true.

The order of dismissal for want of jurisdiction may not have been, technically, the correct judgment, but in its final effect was right. The judgment of the Circuit Court will therefore be affirmed.

Owen J. Aldrich v. Andrew C. Housh.

1. **JUDGMENTS**—*Against Deceased Persons Not Void as to Co-defendants.*—A judgment by confession against two persons, one of whom was dead at the time the judgment was entered, is not void as to the living defendant, but merely voidable, and can not be attacked collaterally.

Replevin, against a sheriff. Error to the Circuit Court of Knox County; the Hon. **HIRAM BIGELOW**, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

ROY M. MARSH and **R. D. ROBINSON**, attorneys for plaintiff in error.

A judgment entered in vacation, by confession, will not be set aside on the sole ground that no affidavit was filed showing that defendant was alive and debt due. The party applying must show equitable reason therefor in addition. *Rising v. Brainard*, 36 Ill. 79; *Farwell, Imp., etc., v. Meyer*, 36 Ill. 510; *Ball v. Miller*, 38 Ill. 110; *Stuhl v. Shipp*, 44 Ill.

133; Gardner v. Bunn et al., 132 Ill. 403; Munford v. Tolman, 157 Ill. 265.

The proper papers to file to authorize the confession of a judgment are, a declaration, a warrant of attorney, with an affidavit of its execution, and a plea of confession; and when these papers are filed the clerk should enter judgment.

The defendant's remedy is to apply to the court when in session to have the order vacated. Roundy, Assignee, v. Hunt, 24 Ill. 598; Gardner v. Bunn et al., 132 Ill. 409; Stein, Block & Co. v. Good, 16 Ill. App. 521.

A third person has no right to object to a judgment by confession on the ground that it was confessed without any authority from the judgment debtor to do so; but the right to interpose any such objection belongs alone to such debtor. Farwell et al. v. Huston, 151 Ill. 239; Claffin et al. v. Dunne, 129 Ill. 247.

A judgment against a deceased person, when jurisdiction has once been acquired, is not void but voidable, and can not be attacked collaterally. Claffin et al. v. Dunne, 129 Ill. 247; Danforth v. Danforth, 111 Ill. 244; Freeman on Judgments, Secs. 140 and 153.

In confessing judgment in vacation on a judgment note, failure to file an affidavit of the execution of a power of attorney is jurisdictional and renders the judgment void; but failure to file an affidavit showing maker is alive and debt is due, is not jurisdictional and can only be taken advantage of in the court where the judgment was entered, by motion to vacate. Stein, Block & Co. v. Good, 16 Ill. App. 516, approved in 115 Ill. 93; Gardner v. Bunn, 132 Ill. 403.

When the jurisdiction to enter judgment is once acquired or shown, no one, except the defendant, can object, and his remedy is by application to vacate the judgment in the court where it was entered. Gardner v. Bunn et al., 132 Ill. 403; Farwell v. Huston, 151 Ill. 239; Stein, Block & Co. v. Good, 16 Ill. App. 516; 115 Ill. 93.

WILLIAMS, LAWRENCE & WELSH, and E. N. WILLIAMS,
attorneys for defendant in error.

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Any stranger may impeach a void judgment collaterally. It binds no one. *Gardner v. Bunn*, 132 Ill. 403 (412), cited by appellant; *Martin v. Judd*, 60 Ill. 78 (84); *Buffum v. Ramsdell*, 55 Maine, 252; 92 Am. Dec. 589; Black on Judgments, Sec. 170, lines 6 and 7 on page 195; Am. & Eng. Cycl. of Law, Vol. 28, 474, under head of "Void and Voidable."

Power to act in another's name can not survive him.

"A conveyance in the name of a person who was dead at the time, would be a manifest absurdity." * * * "For the attorney is in the place of the principal, capable of doing that alone which the principal might do." *Hunt v. Rousmanier*, 8 Wheaton, 174.

That a judgment based on the appearance of a dead woman in court—in person or by an attorney under her warrant—is without jurisdiction and void is conceded in *Danforth v. Danforth*, 111 Ill. 236; *Clafin v. Dunne*, 129 Ill. 241.

A judgment is entire, and if void against one defendant is void against all. *Hanley v. Donoghue*, 59 Md. 239, 43 Am. Rep. 554; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356, 357; *Holbrook v. Murray*, 5 Wendell, 161; *Hulme v. Janes*, 6 Texas, 242, 55 Am. Dec. 774; *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589.

And by analogy. *McDonald v. Wilkie*, 13 Ill. 22; *Brockman v. McDonald*, 16 Ill. 112; *Smith v. Byrd*, 2 Gilm. 412; *Williams v. Chalfant*, 82 Ill. 218; *Clafin v. Dunne*, 129 Ill. 241 (248).

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, being the sheriff of Knox county, by virtue of an execution issued out of the Circuit Court of Warren County upon a judgment in said court entered in vacation by confession for \$1,500 and \$4.80 costs, in favor of C. Aultman & Co., against C. W. Barbero and J. J. Barbero, levied upon personal estate, as the property of J. J. Barbero, defendant in said execution, in Knox county. Defendant in error claiming the property as his own, replevied it from the sheriff. Several pleas and replications thereto were

filed, but before the final judgment, all the pleas except the fourth plea, and all replications except the additional replication to the fourth plea were withdrawn, and the demurrer to such replication having been by the court overruled, and the plaintiff in error electing to stand by such demurrer, final judgment was entered in favor of the defendant in error for the property in controversy, one cent damage and for costs, to reverse which this writ of error is prosecuted.

The fourth plea pleaded by the defendant below is as follows:

"4th. And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because, he says, that C. Aultman & Co., a corporation doing business under the general laws of the State of Ohio, before the said time when, etc., to wit, on the 11th day of June, 1895, sued out of the Circuit Court of Warren County a certain writ of *feri facias* of that date, against C. W. Barbero and J. J. Barbero, directed to the sheriff of this (Knox) county, by which said writ the people of the State of Illinois commanded such sheriff, that of the goods and chattels, lands and tenements, in his county, of the said C. W. Barbero and J. J. Barbero, he should cause to be made the sum of \$1,500.08 damages, and the sum of \$4.80 costs of suit, which, by the consideration of the said court, on, etc., the said C. Aultman & Co. recovered against the said C. W. Barbero and J. J. Barbero, together with interest thereon at the rate of five per cent per annum from the time of recovering the same as aforesaid and also the accruing costs of said judgment, and that such sheriff should have the said moneys ready to render to the said C. Aultman & Co., according to law, and should make return of said writ in ninety days after the said date thereof; which said writ was thereupon, on the said day of the date thereof, there delivered to the defendant, who then and from thenceforth, until and at and after the said time, etc., was sheriff of Knox county aforesaid, to be executed in due form of law; by virtue of said writ, the defendant, as such sheriff as aforesaid, afterward, and before the return day

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of the said writ, to wit, on the same day in the said declaration mentioned, being the said time when, etc., and the said writ being then in full force and unsatisfied, there took the said goods and chattels, in the said declaration mentioned, and detained the same in execution of the said writ; which are the same taking and detention in the said declaration above supposed, etc.; and the defendant further says, that the said goods and chattels in the said declaration mentioned, at the said time when, etc., were the property of the said J. J. Barbero, and not of the plaintiff, as by the said declaration is above supposed, and were subject to execution, to wit, in the county aforesaid, and this the defendant is ready to verify; wherefore he prays judgment, etc.”

The replication thereto is as follows :

“ And the plaintiff, for additional replication to defendant’s fourth plea, saith *precludi non*, etc., because he says the alleged judgment upon which the execution issued, in said fourth plea mentioned, was entered by the circuit clerk in vacation, under a power of attorney, signed and executed by Calista W. Barbero and John J. Barbero, and not otherwise, and at and before the entry of said judgment, said Calista W. Barbero had on, viz., February 1, 1894, departed this life (died), wherefore the plaintiff says that such alleged judgment was and is absolutely void, wherefore the plaintiff prays judgment, etc.”

It will be observed the replication does not deny the property was that of J. J. Barbero, as it is alleged in the plea. The error assigned upon the record, to be considered here, is that the court erred in overruling defendant’s demurrer to replication of plaintiff, to the fourth (amended) plea of defendant. By the pleadings and the briefs and arguments of the counsel, the only question presented in this court for adjudication is, whether, by the confession of the judgment against Calista W. Barbero and J. J. Barbero jointly, at the same time the former being dead, renders the judgment against the latter void, to the extent of permitting a stranger, as the defendant in error, to attack it collaterally. No decision, either in Supreme or Appellate

Courts in this State, has been cited by any counsel in the case that we consider directly in point on this question, and we therefore shall reach our conclusion from analogies, and from our own conception of the justice of the case.

If the judgment was against Calista W. Barbero alone, no difficulty would be encountered, for all would admit the judgment void for the want of the jurisdiction of the court to render it, she having died before the application was made for the same. But the judgment being both against the dead and the living defendants it is necessary to consider its effect against the latter. The weight of all the authorities is that such judgment is erroneous, and on error or appeal by the living defendant, or the legal representatives of the dead, or even by application to the court in which the same was confessed, it would be reversed or set aside, for if erroneous as to one it is erroneous as to all. *Claffin v. Dunne*, 129 Ill. 247, and cases there cited. But it by no means follows, we apprehend, that because the judgment would be reversed on application of one of the parties to it, or by the legal representatives of the deceased party, that therefore it is so far void as to the living defendant that any stranger may attack it collaterally, when invoked against the living party. In *Danforth v. Danforth*, 111 Ill. 240, it would seem this reservation was in the mind of the court when it used this expression: "When the sole defendant is dead when the suit or writ of error is brought, it may be true that a judgment against the deceased defendant is a nullity, for the reason that the court never acquired jurisdiction of the cause." All authorities agree, the reason a judgment is void against a party who was dead when suit began, is that the court never acquired jurisdiction. The weight of authority, however, where such party dies after suit commenced is, as held in *Claffin v. Dunne*, *supra*: "As said before, there are authorities holding that a judgment rendered against a deceased person is void, but we think the weight of authority, and the reason of the rule is, that such judgment is not void, but voidable." And that it can not be attacked collaterally, but could be reversed.

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It is therefore indisputable that the void condition of a judgment against a deceased person is because the court at no time in the history of the proceedings acquired jurisdiction of the cause to render any judgment. Does the judgment in the case presented represent such a condition? We think not. The judgment, so far as it is material to the present proceedings, is against John J. Barbero, and there can be no question the court had jurisdiction of the cause so far as it affected him. His co-defendant was dead, it is true, but this to him was, at most, but an irregularity. It could be corrected on error or by application to the same court, and when done judgment would still abide against him personally, upon which, execution, with no other effect than the present one, would issue against him, thereby demonstrating the usefulness of the rule preventing strangers to the record from attacking a judgment collaterally for reasons that in no wise concern them.

We are therefore of the opinion the judgment as rendered was not void, but voidable only on the application of John J. Barbero, or the legal representatives of Calista W. Barbero; and the defendant in error, being a stranger to the same, could not attack it collaterally, as he was by the court allowed to do. It was error to overrule the demurrer to the replication and enter judgment thereon, and the said judgment of the Circuit Court will be reversed and the cause remanded.

City of Rock Island v. Katy Drost.

1. *TRIALS—Accurate Rulings Required in Close Cases.*—Where the issues of fact involved in a case are closely contested, the rulings of the trial court, as to the admissibility of evidence, and in the instructions to the jury, should be accurate.

2. *EVIDENCE—Photographs of Plaintiff in Personal Injury Cases.*—In a suit for personal injuries the trial court admitted in evidence a photograph of the plaintiff taken nine years before the trial. *Held*, on appeal, that this was improper and could only have misled the jury, especially as to the damages.

3. INSTRUCTIONS—*Should Not Assume Facts in Dispute*.—An instruction assuming the existence of any of the facts in dispute is improper and should not be given.

4. CITIES AND VILLAGES—*Duty of, as to Streets, Defined*.—Cities are only required to use reasonable care to keep their streets in safe condition for travel, and an instruction imposing upon a city the absolute duty of keeping its streets in safe condition is improper.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Rock Island County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

JOSEPH L. HAAS, attorney for appellant.

Where the evidence is conflicting all the instructions should be accurate, clear and perspicuous. Error in one instruction is not cured by others that are proper. City of Hoopeston v. Eads, 32 Ill. App. 75; Sinnet v. Bowman, 151 Ill. 146; Smith v. People, etc., 142 Ill. 117; McClory v. Lancaster, 44 Ill. App. 213; Demme & D. F. Co. v. McCabe, 49 Ill. App. 453.

An instruction "that a city is bound by law to use all reasonable care, caution and supervision to keep its streets in a safe condition for travel," is erroneous. It is only required to use reasonable diligence to keep its streets in a reasonably safe condition of repair. City of Hoopeston v. Eads, 32 Ill. App. 75; City of Sandwich v. Dolan, 141 Ill. 430.

J. T. KENWORTHY and LOONEY & KELLY, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellee against the appellant for personal injuries incurred in consequence, as she alleges, of the negligence of the appellant in the care and maintenance of a certain street within the corporate limits of said city called Twelfth street.

The alleged negligence consisted in certain alleged embankments, holes, excavations and sand-pits, suffered and permitted by the municipal authorities of the appellant to

remain in said street, whereby the appellee, in the exercise of ordinary care, while driving along the said street in the night time, was turned over in a buggy and hurt.

On the trial of the case, the jury returned a verdict for the appellee, assessing her damages at \$6,369, and after overruling the motion for a new trial the court gave judgment against the appellant on the verdict, from which this appeal is prosecuted.

For a reversal of the judgment, the appellant assigns for error that the court admitted improper evidence and gave improper instructions to the jury.

The evidence is voluminous, and it would subserve no good or useful purpose to discuss it here. Inasmuch as the case must be remanded, for trial by another jury, it would at this time be inappropriate to make any extended remarks upon the evidence. The questions of fact in issue were in close conflict, requiring accuracy in the rulings of the court on the admissibility of the evidence, and in the instructions of the court to the jury. We are satisfied improper evidence was admitted affecting the verdict injuriously to the appellant, especially in the amount of the damages. The photograph of the appellee, taken nine years before the trial, was admitted against the objections of the appellant. This could only have misled the jury, without tending to prove any important fact for the appellee. By this photograph the jury could only have been led to a comparison of the personal appearance of the appellee at the time of the trial, and at the time of the picture, it being safe to assume, from the evidence, she was somewhat emaciated in appearance at the trial, and from the photograph appeared to be in good health, thereby, as we think, unduly enhancing the damages.

The case being a close one upon the evidence, required the jury to have had correct principles of the law laid down for their proper guidance in the determination of the issues of fact. In this respect, regarding several of the instructions to the jury, we are compelled to say they were misdirected as to material issues in the case, to the serious prejudice, as we think, of the appellant. To instance, in

this connection, by the third instruction given to the jury at the request of the plaintiff, they were told, in case the plaintiff, while driving along and on the street in question, was injured as alleged in her declaration, and that the injury would not have happened to her if the said street had been in reasonably good repair and safe condition, then the defendant would be liable for such injury. This instruction clearly assumes the street was out of repair and in unsafe condition, and directs the jury that appellant was liable for the injury resulting from such condition. This was one of the issues for the jury to decide from all the evidence, and the court should not have assumed the existence of the bad condition of the street in its instruction. The instruction could not have been otherwise than misleading.

The fifth instruction given to the jury at the instance of the plaintiff, and the modifications, of its own motion, by the court, of the seventeenth and eighteenth instructions given by request of defendant, inform the jury, in effect, that the appellant was bound to keep its streets in safe condition for travel, when the law only requires it to use reasonable care in that respect. These instructions imposed upon the appellant the absolute duty of keeping its streets in safe condition, when, if the jury had been accurately instructed, they would have understood appellant had discharged its whole duty to the public if it had used reasonable care to keep its streets in a reasonably safe condition. The distinction is radical, and we think the jury could not have misunderstood the instructions, repeated as they were both for the plaintiff and defendant, and we can not escape the conviction, in view of the verdict induced, the jury was misled by these erroneous and improper instructions.

For the errors in the admission of improper evidence to the jury, and the giving to the jury of improper instructions, the judgment of the Circuit Court is reversed and the cause remanded.

Franklin MacVeagh et al. v. F. E. Royston et al.

1. **CONSTRUCTION—Of Statutes.**—It is an elementary principle in the construction of statutes that no one section of a statute, nor any single statute, should be considered alone, but that all existing statutes should be construed together, so that, if possible, one harmonious whole may be produced.

2. **COURTS—Relative Authority of.**—Courts are but the instruments of the law, and it can not be justly said that one court is superior to another, if each has equal jurisdiction of the particular matter involved; but the order of each, if made at the same time and under the same circumstances, should be placed on a parity, for both are equal in point of authority, as pronouncing the final sanction of the law.

3. **ATTACHMENTS—An Order of Distribution of the Proceeds of a Sale under Several Attachments, Approved.**—On September 26, 1896, an execution against A and in favor of B was issued by a justice of the peace and placed in the hands of C, a constable; on September 25, 1896, D and E commenced suit against A in the Circuit Court, and on September 28, 1896, D sued out an attachment in aid of his suit; on the same date F, G and H sued out attachments against A before a justice of the peace, and I sued out an attachment before a city court; and on October 31, 1896, E sued out an attachment in aid of his suit. The attachments were all placed in the hands of C, who was both deputy sheriff and constable, and were levied on the same property. All the suits were prosecuted to judgment, executions were issued and the property sold. E then applied to the Circuit Court for an order of distribution, claiming that he and D had a first claim on the money in the hands of the officer. The court directed that after the payment of costs the claims be paid in the following order: 1st, B's judgment; 2d, D's judgment; 3d, the judgments of F, G, H and I, in the order of their priority; 4th, E's judgment. *Held*, on appeal, that the order was right.

Petition, for order of distribution in attachment proceedings. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLS, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed September 20, 1897.

MORAN, KRAUS & MAYER and ALSCHULER & MURPHY, attorneys for appellants.

A. J. HOPKINS, F. H. THATCHER, and F. A. DOLPH, attorneys for appellees F. E. Royston & Co.

ALDRICH, WINSLOW & WORCESTER, attorneys for appellees Jameson, Sheets & Co.

JOHN M. RAYMOND, attorney for appellees Dwinell & Wright.

LEE MIGHELL, attorney for appellee Fred Holmes.

G. C. VAN OSDEL, attorney for appellees Durand & Kaspar.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This is an appeal from the Circuit Court adjudicating priorities, and making distribution among an execution and several attachment creditors, of the proceeds of sale of attached property of one White Dawson. Royston & Co. commenced suit in the Circuit Court on September 25, 1896, and sued out an attachment in aid of their suit on September 28, 1896, and appellants commenced suit in same court and on the same date but did not sue out an attachment until October 31, 1896. Several intermediate attachments were sued out respectively, by Jameson, Sheets & Co., Durand & Kaspar, and Eby & Michaels, on September 28, 1896, before a justice of the peace, and on the same day Fred Holmes sued out an attachment from the city court of Aurora, and on September 26, 1896, an execution for \$61, issued by a justice of the peace against Dawson, in favor of Dwinell & Wright, was placed in the hands of G. W. Kimball, a constable, which was afterward transferred to the same officer, in whose hands all of the said attachment writs were placed. All the attachment writs were, as soon as issued, placed in the hands of Fred Holtz, who was at the same time both deputy sheriff and constable. The stock of groceries, the property of White Dawson, was seized and taken into possession by the said Fred Holtz, as deputy sheriff, under the attachment writ of Royston & Co., in the first instance. The officer also indorsed upon the several attachment writs, as they came into his hands, levies upon the same property, the possession of which he had previously taken under the writ of Royston & Co. All the attachment proceedings were prosecuted to a conclusion, judgments entered therein in the respective courts in which

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they were pending, and special execution awarded and issued to the said Fred Holtz, for the sale of said attached property. After due notice the officer sold the property, and the proceeds of the sale, \$1,290, remaining in his hands, appellants applied to the Circuit Court for an order of distribution among the attaching creditors, insisting that they and Royston & Co. had the first claim to such proceeds. The court, under section 37 of the attachment act, ordered the proceeds of sale distributed as follows: First, the costs of sale. Second, the Dwinell & Wright execution. Third, Royston & Co. in full. Fourth, that the judgments of Fred Holmes, Jameson, Sheets & Co., Durand & Kaspar, and Eby & Michaels, be each severally satisfied in the order of their priorities, or to the extent to which the balance may apply. Fifth, and not until after the said judgments and executions so mentioned are satisfied in full, shall any payment be made to appellants. Under this order appellants would receive no part of the said proceeds of sale, from which order they appeal to this court, and ask a reversal thereof because of the errors alleged, insisting they were entitled to the same standing and priority awarded to Royston & Co., whom they admit are entitled to be first paid. The only question, therefore, arising in the case, is as to the rights of the intermediate attaching creditors, in the city court and before the justice of the peace, to a priority over the appellants in the distribution of the proceeds of the sale of the attached property.

It will be observed in the beginning, that all the attachments were issued and levied on September 28, 1896, except that of appellants, which was October 31, 1896.

The contention of counsel for appellants is, as we understand them, that the intermediate attaching creditors, if they desired to secure the right to share in the proceeds of the sale of the attached property, should have commenced their suits in the same court with the first attaching creditor, Royston & Co., and having failed to do this, as a matter of law, they are subordinated to all creditors who did so. This is the question here presented for decision.

We have examined the authorities cited by counsel for

appellant, in support of their position, and find none of them directly in point upon the question. All the authorities cited, so far as we can see, relate to priorities arising between attaching creditors who had sued out their attachments from the same court. The question here presented is, whether attachment creditors in different courts shall have priorities in the order of time in which their respective attachment suits were begun, without reference to the particular court in which they were respectively prosecuted.

To properly determine this question it may be useful, if possible, to ascertain the legislative intent in passing the laws upon this subject; for it will hardly be disputed the remedies here afforded are of a purely statutory nature, in no way depending on the common law for their existence. It is an elementary principle, in the construction of a statute, that no one section of a statute, nor any single statute alone, shall be considered, but all existing statutes shall be construed together, so, if possible, one harmonious whole may be produced. Having this principle in view, we will compare and endeavor to construe together section 51, chapter 77, and sections 29 and 57, and incidentally section 37 of chapter 11, Starr & Curtis. Section 51 of chapter 77, which is the chapter on judgments, decrees and executions, provides, that if the goods and chattels sold on execution have been attached by another creditor, or seized on another execution, either by the same, or any other officer, the proceeds of the same shall be applied to the discharge of the several judgments in the order in which the respective writs of attachment or executions became a lien, or are entitled by law to share. While this section was not by the legislature placed in the statute specially devoted to attachment proceedings, it nevertheless has relation to that subject, and no reason is perceived why its provisions should not be invoked, applied and given their due effect, if the facts in a given case should require.

To make it seem more probable that the legislature intended these statutes to be applied in the manner indicated by section 57, chapter 11 (Starr & Curtis), relating to attachments, it is expressly provided that the provisions of

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law governing attachments in courts of record shall apply to attachments before justices of the peace, so far as the same are applicable and not inconsistent with the provisions which are especially applicable to the latter. No reason is perceived why the provisions of the section to which reference was last made, do not make the provisions of section 37, same chapter, under which the application of appellants was made, also applicable to similar proceedings before a justice of the peace. Section 29 of the chapter last mentioned provides that in all cases of attachment any person other than the defendant may claim the property and interplead, and it has been held a judgment creditor may assert his lien in this manner. *Schilling v. Deane*, 36 Ill. App. 513.

From these provisions of the law governing attachment proceedings, is it not apparent the policy of the law is, that all creditors, if they be equally diligent, shall be placed upon an equality, and that the estate of the debtor shall be distributed among them equally and impartially? This policy can only be made effective by holding that when judgments are obtained in conformity with law, the law thereby appropriates the property of the debtor in its hands to the payment of all indebtedness, in relation to the time the several judgments are obtained. Courts are but the instruments of the law, and it can not be justly said that one court is superior to another, if each have equal jurisdiction of the particular matter involved; for in this respect the order of each, if made at the same time and under the same circumstances, should be placed on a parity, for both are equal in point of authority, as pronouncing the final sanction of the law.

Hence, if our reasoning is sound, and surely it has equal and exact justice in support of it, it follows that section 51 of the chapter on judgments, decrees and executions, is supplemental to and a part of the law governing attachment proceedings, and by express enactment the provisions of law governing attachment in courts of record shall apply to attachments before justices of the peace; and applying the provisions of section 51 to the case presented, as we think may properly be done, the order of the Circuit Court was right, and it will be affirmed.

71	622
81	621
82	607
71	622
84	576
71	622
e108	*204

Chicago & Alton R. R. Co. v. C. G. Pearson, Adm'r.

1. **PLEADING**—*Pleading to the Merits Waives a Demurrer.*—By abandoning a demurrer and pleading to the declaration a defendant admits its sufficiency and can not afterward be heard to assign the decision upon the demurrer as error.

2. **EVIDENCE**—*Certain Evidence Held Not Admissible Under the Pleadings.*—In a suit against a railroad company for causing the death of the plaintiff's intestate, the court admitted evidence to show that prior to the accident the railroad had erected and maintained an electric alarm bell, which, according to the fair inference from the evidence, the deceased before that time knew, and that, on the day of the accident, the bell had been cut out so that it was not in operation at the time of the injury. No count in the declaration referred to the bell as having been taken out. *Held*, that in the condition of the declaration it was error to admit the evidence.

3. **RAILROADS**—*Speed of Trains as Negligence.*—In a suit against a railroad company charging negligence in running a train at a high rate of speed, the court holds that the trial court erred in refusing to instruct the jury that there was no law limiting the rate of speed of railroad trains under the circumstances shown.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Livingston County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

C. C. & L. F. STRAWN, attorneys for appellant.

A. P. WRIGHT, M. E. WRIGHT and A. C. NORTON, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was an action on the case by the appellee as administrator of Ole B. Thompson, deceased, for the alleged negligence of the appellant, whereby the death of said Thompson was occasioned at the street crossing in the village of Odell. The declaration contains seven counts. A demurrer was sustained to the first, fourth and fifth counts and being overruled as to all other counts, the appellant filed the general issue thereto, and upon the trial the jury

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returned a verdict of guilty, and assessed the damages at \$5,000, upon which the court rendered judgment, and the appellant prosecutes this appeal therefrom, insisting the court erred in overruling the demurrer to the second, third, fifth and seventh counts of the declaration; in refusing to instruct the jury to find their verdict for the defendant; in admitting improper evidence to the jury, and in giving improper instructions; and also in refusing proper instructions to the jury asked by appellant; and that the verdict is against the weight of the evidence.

By pleading to the counts, to which the demurrer had been overruled, appellant waived its objections thereto. If it deemed its demurrer well taken it should have abided by the same, and not tendered an issue on the facts. By abandoning the demurrer and pleading to the counts, appellant admitted their sufficiency, and can not now assign the decision upon them as error. *American Express Co. v. Pinckney*, 29 Ill. 392.

As the case must be again tried by another jury, we refrain from commenting upon the propriety of the court instructing the jury to find for the defendant, and likewise concerning the question whether the evidence supports the verdict; we being permitted, however, to say the case is a close one upon the material issues affecting the alleged negligence of the appellant, and of due care on the part of the deceased at the time he was killed, and requires that no improper evidence be admitted, and that the instructions given to the jury should be accurate, and that every correct principle of the law applicable to the material issues in the case, should have been given so far as requested by the appellant.

On the trial of the case, against the objection of the appellant, and in the face of its motion to exclude such evidence from the consideration of the jury, the court admitted evidence to show that prior to the accident resulting in the death of Thompson, at the crossing in question, appellant had erected and maintained an electric alarm bell, which, according to the fair inference from the evidence, deceased

before that time knew; and on the day of the accident appellant had cut the bell out, so that at the time of the injury to the deceased it was not in operation. No count in the declaration in any way refers to the electric alarm bell so located at the street crossing, either as having been on that day, or at any other time, taken out.

In the view we have already indicated, and in the condition of the declaration in this respect, we think it was error for the court, against the objection of appellant, to admit the evidence relating to the electric alarm bell. The jury could only have inferred from such evidence that it was negligence to have taken the alarm bell out under the circumstances, and that the deceased, not observing its alarm, as they doubtless believed he was accustomed to, was thereby led to his death. Had any count of the declaration, by proper averments, been predicated upon such theory, no doubt is entertained the point might have been properly submitted to the jury.

The seventh count of the declaration is based for its grounds of negligence upon the alleged high rate of speed by which the train that killed deceased was run; and it was contended such rate of speed, under the then circumstances, constituted negligence on the part of the appellant. The sixteenth instruction asked by appellant and refused by the court, sought to inform the jury that there was no law limiting the rate of speed of railroad trains under the facts as proved. Negligence being a question of fact for the jury to determine, it might be, under given circumstances, the jury could rightfully say a high rate of speed would, as a matter of fact, be negligence; but, when so considering the evidence, to arrive at such fact, it would be of the highest importance for them to know the law itself did not so esteem it. We think the instruction so refused was material to the issue being tried, and it was error to refuse it.

For the errors we have named the judgment of the Circuit Court will be reversed and the cause remanded.

City of Streator v. Charles Liebendorfer.

1. **CITIES AND VILLAGES—*Liability of, for Injuries Caused by Defective Sidewalks.***—In a suit against a city for injuries received on a defective sidewalk, the defendant asked the trial court to give to the jury the following instruction :

“The jury are instructed that a city is not liable for every accident that may occur from defects in its sidewalks. Its officers are not required to do everything that human energy and ingenuity can possibly do to prevent the happening of accidents, or injury to the citizen. And if in this case the officers of defendant have exercised a reasonable care in that regard, they have discharged their duty to the plaintiff and you should find the defendant not guilty.”

Held, on appeal, that the instruction announced the correct rule of law applicable in cases like the one presented, and that it should have been given.

2. **BURDEN OF PROOF—*The Rule as to, Stated.***—The rule as to the burden of proof in civil cases, is correctly stated in the following instruction :

“The court instructs the jury that the burden of the proof in this case is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. If the jury find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff can not recover and the jury should find for the defendant.”

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of La Salle County; the Hon. GEO. W. STIPP, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

P. J. LUCEY and GEO. HODLEY, attorneys for appellant.

GEO. W. W. BLAKE and GEO. E. GLASS, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was a suit by appellee against the appellant for personal injuries sustained by him in consequence of an alleged defective sidewalk in the corporate limits of the city of Streator. The negligence charged in the declaration

against the appellant is, that it suffered the sidewalk to be and remain in bad and unsafe condition, and the planks, sills and stringers of the same were not nailed, out of place, decayed, worn away, broken and removed, and a hole or holes suffered to be and remain therein, at the edge of the same; and while appellee, in the exercise of due care, was passing upon the walk, he stepped into said hole and was injured. The jury returned a verdict of guilty, and assessed the plaintiff's damages at \$3,000, upon which the court, after overruling its motion for a new trial, gave judgment against appellant, from which it prosecutes this appeal.

Counsel for appellant complained of numerous rulings of the court, during the progress of the trial, concerning the admissibility of the evidence; and while some of these rulings were doubtless wrong, we do not think they were so far prejudicial to appellant as to be of sufficient importance to require a reversal of the judgment.

Upon the question of the negligence of the appellant the case was a close one, in view of all the evidence, and required the law to be accurately given to the jury. There was much, also, in the case tending to affect the credibility of some of the witnesses for the plaintiff, also requiring proper instructions concerning the burden of proof.

The court was asked by the appellant to give to the jury the two following instructions:

"17. The jury are instructed that the city of Streator is not liable for every accident that may occur from defects in its sidewalk. Its officers are not required to do everything that human energy and ingenuity can possibly do to prevent the happening of accidents, or injury to the citizen. If they have exercised a reasonable care in that regard they have discharged their duty to the plaintiff, and you should find the defendant not guilty.

18. The court instructs the jury that the burden of the proof in this case is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. If the jury find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the

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defendant, then the plaintiff can not recover and the jury should find for the defendant."

The court refused to give them to the jury, to which action of the court the appellant duly excepted, and it is earnestly urged this was error, and seriously prejudicial to the rights of the appellant.

We think the seventeenth instruction quoted above, in which the court is requested to inform the jury that if appellant had exercised reasonable care to prevent injury to the citizen it had discharged its duty to the plaintiff, and should be found not guilty, announces the correct rule of the law applicable to the duties of municipal corporations in cases like the one presented, and should have been given by the court.

The eighteenth instruction, containing the rule that if the evidence was found by the jury to be equally balanced on the plaintiff's case, the plaintiff can not recover, is, we think, elementary, and should have been given, especially as the evidence was closely contested upon this point. The rule was correctly stated, and peculiarly applicable to the issue in the case, and appellant was in a position to demand it to be given to the jury as an instruction from the court. The principles of these instructions were nowhere sufficiently or clearly expressed in the instructions given by the court to the jury, and it was, in our opinion, error to refuse them.

There are other instructions in the case severely criticised by the counsel for appellant, but the objections to them will doubtless be obviated on another trial, without further attention here.

For the errors designated the judgment of the Circuit Court will be reversed and the cause remanded.

William Vanston, Impleaded, etc., v. George S. Boughton.

1. JUDGMENTS—*When a Judgment Must be Joint.*—There is no warrant in the law for rendering judgment against defendants severally when sued in a joint action on a contract. In such case there can be but one

judgment for one amount, and it must be against all the defendants unless one or more have been discharged from the suit.

2. *PRACTICE—Where Judgment is Improperly Rendered Against One Defendant Only.*—A judgment by confession was rendered against two parties, but was afterward vacated on motion of one of them, and leave given him to plead. A trial was then had, a verdict rendered and judgment entered against such defendant alone. The other defendant did not participate in the motion to vacate the judgment, and for leave to plead, and his plea of confession remained on file and in full force. *Held*, on appeal, that the judgment should have been against both defendants, and that it must be reversed with directions to the trial court to enter the proper judgment.

Confession in Vacation.—Appeal from the Circuit Court of Winnebago County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded with directions. Opinion filed September 20, 1897.

FROST & McEVOR, attorneys for appellant.

FISHER & NORTH, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

A judgment was entered by confession in vacation of the Circuit Court, against appellant, jointly with one Seymour J. Manor, for \$240.24, upon a promissory note and warrant of attorney to confess judgment. Under the authority of the warrant, the execution of which was duly proved by affidavit appearing in the record, both defendants appeared in court by attorney, filed plea of confession, and thereby waived the service of process, confessed judgment in favor of plaintiff for the sum above mentioned, and released all errors that might intervene in entering up such judgment. The appellant subsequently appeared in court, and on his motion the judgment so entered was set aside and leave given him to plead. The issues made upon the plea filed by appellant were tried by jury, resulting in a verdict for the plaintiff, assessing his damages at \$239.92. Upon this verdict the court rendered judgment against appellant alone, to reverse which he appeals to this court. The only error argued by counsel for appellant in his brief, is in rendering judgment against appellant alone, and this will be regarded

as an abandonment of all other errors assigned upon the record.

There is no warrant in the law for rendering separate judgments against defendants severally, when sued in a joint action upon a contract. In such case there can be but one judgment for one amount, and it must be against all the defendants, unless one or more have been discharged from the suit. The proper course is to assess damages against both defendants and render a joint judgment against them. *Gould v. Sternburg*, 69 Ill. 531; *Felsenthal v. Durand*, 86 Ill. 230; *Gribbin v. Thompson*, 28 Ill. 61.

Appellee has asked this court, if it shall conclude the judgment erroneous and reversible, to render the proper judgment on the verdict, or direct the Circuit Court to do so, to which appellant objects the verdict is against appellant alone, and that no default was taken in the Circuit Court against the defendant Manor, and for those reasons no judgment could be properly rendered against both defendants upon such verdict. We see no force in this objection. The defendant Manor did not participate in the motion to vacate the judgment and for leave to plead, consequently up to the time of the trial his plea of confession remained before the court in full force; he was not in default, and it could not properly be entered against him; he had already entered his appearance in the cause, waived the issuance of summons and confessed the action of the plaintiff, and the plea accomplishing this purpose had not by him been withdrawn; he had already confessed the plaintiff's damages. While the verdict is not in that precise form, yet its legal effect is to find the issues for the plaintiff and assess his damages at \$239.92, which we think is a sufficient verdict for every purpose in the case, and binding on all the parties. It would be proper for the court to render judgment upon it against both the defendants. It is not an unusual practice for an Appellate Court to reverse the judgment of the lower court with directions to enter the proper judgment, and in some instances the costs of this court have been taxed to the appellant. *Moore v. People*, 13 Ill. App. 248; *Masters v. Masters*, *Ib.* 611.

The judgment of the Circuit Court will therefore be reversed and the cause remanded to that court, with directions to it to enter judgment upon the verdict against both defendants.

CRABTREE, P. J., took no part.

Oliver H. Vinton v. Cora A. Felts.

1. **EXEMPTIONS**—*A Husband May Convey Exempt Property to His Wife.*—When a husband conveys all his property to his wife, with whom he is living, by bill of sale duly acknowledged and recorded, at a time when no execution against him exists, and such property does not exceed \$400 in value, and would, if still owned by the husband, be exempt from execution against him on compliance with the conditions of the statute concerning exemptions, such conveyance is not fraudulent as to his creditors.

Replevin, against a constable. Appeal from the Circuit Court of Winnebago County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

ANDREWS & VAN TASSEL, attorneys for appellant.

FISHER & NORTH, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was an action of replevin by appellee against appellant, the latter being a constable who had levied an execution issued by a justice of the peace against George W. Felts, the husband of the appellee, upon a set of blacksmith's tools, a cow, mare and household goods, as the property of the defendant in execution.

George W. Felts was the head of a family, and he and the appellee resided together as husband and wife. Prior to the issuance of the execution the husband, by bill of sale duly executed, acknowledged and recorded, had conveyed

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the property in question to his wife. On the trial it was claimed by appellant this conveyance was made to hinder and delay the creditors of the husband, and therefore fraudulent, and the defendant in execution having made no schedule, as provided by the exemption laws, it was therefore insisted that the property was subject to be taken by the officer upon the execution against the husband.

The appellee claimed, and proved at the trial, that the household goods were her property, independently of her husband, and by the special finding of the jury the remaining property was valued at \$175. The verdict and judgment were in favor of the appellee, from which appellant prosecutes this appeal.

Complaint is made by the counsel for appellant of certain of the instructions given by the court to the jury; but independently of any instructions in the case, that may have been given or refused, we are of the opinion, if it shall be conceded the property does not exceed in value \$400, it would not be subject to the execution against the husband, under the facts in this case. The special verdict of the jury fixed such value, and the evidence further shows the execution debtor had no other property.

Where the husband, by bill of sale duly acknowledged and recorded, conveys all the property owned by him to his wife, with whom he is at the time living, and at a time when no execution exists against the husband, and such property does not exceed \$400 in value, and which would, if still owned by the husband, be exempt from execution against him, on compliance by him with the conditions of the statute concerning exemptions, such conveyance, under the facts stated, is not, in our opinion, fraudulent as to any creditor or creditors of the husband. The exemption laws, in their policy, are as much for the benefit of the wife as of the husband, and this affords a sufficient consideration for the conveyance.

Finding no error in the record of the Circuit Court, its judgment will be affirmed.

CRABTREE, P. J., took no part.

**Chicago & North Western Ry. Co. v. Charles H. Patrick,
Adm'r.**

1. **NEGLIGENCE**—*A Charge of, Held Not Supported by the Evidence.*—This court finds that the appellant was not guilty of the negligence charged, that appellee's intestate was not in the exercise of ordinary care for his own safety at the time he was killed, and that the trial court should have directed the jury to return a verdict for appellant.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Winnebago County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the May term, 1897. Reversed, with finding of facts. Opinion filed September 20, 1897.

CHARLES A. WORKS, attorney for appellant.

FISHER & NORTH, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

On the night of May 26, 1895, Axel Peterson and another were returning to Belvidere from Rockford in a buggy, when on reaching Cherry Valley, a village on their route, and a station on the railroad of the appellant, for some unknown cause, instead of proceeding east on the road to Belvidere they turned north on Cherry street, in said village, across the Belvidere road and over the railroad tracks of appellant, proceeded about four rods north of the crossing, where they faced about, returned to the crossing, where they were struck and killed by an engine connected with a freight train, coming from the west. Appellee, as the administrator of the estate of the deceased, brought this action against appellant, charging it with negligently causing such death, demanding damages therefor. Upon the trial, the jury returned a verdict of guilty, assessing the damages at \$3,000, for which the court gave judgment against appellant, after having overruled its motion for a new trial, to reverse which this appeal is prosecuted. Appellant insists the ver-

dict is contrary to the evidence, and that the court erred in refusing, on its motion, to direct a verdict for the defendant at the close of the evidence in the case.

We have carefully examined all the evidence in the abstract, and considered the briefs and arguments of the counsel on both sides. The material questions now to be determined are, whether the appellant is guilty of any negligence whereby the death of Axel Peterson was produced, and whether the deceased himself, at the time he was killed was in the exercise of ordinary care for his own safety.

The train did not stop at Cherry Valley unless signaled, and on this occasion there being no such signal, it was running with no purpose of stopping. The train appears to have been well equipped, and in charge of a proper crew. By a fair preponderance of the evidence we think it may be well believed the usual signals for the station and highway crossing were given. Besides this, the engine had a bright head-light, in good order and burning, that some of the witnesses say could be seen two miles away. It would seem the train was running at no greater speed than was common under such circumstances. The night was moonless, but without clouds. In passing over a neighboring bridge the rumble of the train could be heard in all the vicinity where the accident occurred. In all these conditions, it would be natural that the engineer, reasoning as an ordinary man, would presume all persons, if in the right use of the faculties common to man, would gain intelligence of the approaching train and avoid its track. He swears he did not see the buggy until it appeared upon the track in front of the engine, and so near to it he could not stop by any possible means before the collision. From these facts and circumstances, with others that could be recited, proved on the trial, we conclude appellant was guilty of no negligence producing the death of appellee's intestate.

Was the deceased in the exercise of ordinary care for his own safety at the time he was killed? Shortly before his death he had driven north over the railroad tracks and knew, if in the exercise of ordinary care, that the railroad was

there; that it was a crossing, and that a train or trains, were liable at any time to pass over the crossing; and that under such circumstances it was a place of danger. An ordinary man in the exercise of ordinary care, knowingly, about to cross a railroad, would, we think, generally be cautious. Independently of this, however, all the witnesses who have testified to any knowledge of being in the vicinity of the accident when it occurred, heard the noise of the train or saw its lights. If the deceased was possessed of the natural senses of hearing and seeing, and it is presumed he was, and in the proper use of them, as an ordinary man is supposed to be in a known place of danger, it seems to us difficult and unreasonable to believe he did not know of the approaching train. He, either from heedlessness, did not know the train was near, or knowing it, recklessly took the chances of danger in crossing the track; which, in either case, would prevent a recovery by the appellee in this action.

We are compelled to the conclusion the intestate of the appellee was not in the exercise of ordinary care for his own safety at the time he was killed.

Inasmuch as the evidence fails to prove actionable negligence against the appellant, to cause the death of Axel Peterson, and for the further reason that the evidence has established that he was not in the exercise of ordinary care for his own safety at the time of the collision, it was error to deny the motion of the appellant to direct a verdict in its favor; and for this error the judgment of the Circuit Court will be reversed, and the clerk of this court directed to recite, in the final order of this court, the finding of facts hereto appended.

Judgment reversed.

CRABTREE, P. J., took no part.

FINDING OF FACTS.

And the court finds that the appellant is not guilty of the negligence charged in the declaration of the appellee, or any count thereof; and the court also finds that the said Axel Peterson was not in the exercise of ordinary care for his own safety at the time he was killed.

City of Kankakee v. Whitehouse.

City of Kankakee v. Christina Whitehouse.

1. INSTRUCTIONS—*Error Without Injury Not Ground for Reversal.*—Although the instructions may not have been free from error, if it appears that under the evidence the jury could not have been misled, the error furnishes no ground upon which to reverse the judgment.

2. CITIES AND VILLAGES—*A City Held Liable for an Injury Caused by a Defective Walk.*—The court thinks that the evidence in this case warranted the jury in finding that the walk upon which appellee was hurt was in bad condition at the time of the accident upon which this suit is based; that the board that caused the injury to appellee had been broken from its fastenings and had thereby become dangerous to pedestrians; and that this condition had existed for such a length of time that the municipal authorities should have known of it and repaired the walk.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

PADDOCK & COOPER and T. F. DONOVAN, attorneys for appellant.

H. LORING, attorney for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against the appellant, alleging that on the 15th day of June, 1896, the defendant negligently suffered a board sidewalk in said city to be in an unsafe condition; that one of the boards was loose, on which appellee tripped, fell and dislocated her hand and wrist. The jury found in favor of the appellee, and assessed her damages at \$250; and the court having overruled the appellant's motion for a new trial, rendered judgment on the verdict against the appellant, from which it appeals to this court, assigning for error improper evidence was admitted by the court, improper instructions to the jury, and that the verdict is against the weight of the evidence.

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We find no reversible error in the rulings of the court, nor in the instructions to the jury. Some of the instructions are not free from criticism, but we think, under the evidence, the jury could not have been misled by them. We think the evidence warranted the jury in finding that the walk in question was in bad condition; that some of the boards, especially the one that caused the injury to appellee, had become broken from their fastenings, and thereby dangerous to pedestrians; and that this condition had existed for such a length of time that the municipal authorities, in the exercise of reasonable care, should have known of such condition, and repaired the walk.

We find no error sufficient to reverse the judgment of the Circuit Court, and it will therefore be affirmed.

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County of Rock Island v. Union Printing Company.

1. PLEADING—*In Declaring on a Liability Arising under a Statute, the Statute May be Followed.*—In a suit against a county to recover the price of publishing a list of nominations for office, as required by sections 2 and 19 of the ballot law, the declaration was demurred to on the ground that it did not show who were the judges of election ordering the publication. *Held*, that as the declaration followed the statute in the respect referred to it must be sustained.

Assumpsit, for the price of publishing a list of nominations for office. Appeal from the County Court of Rock Island County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

C. J. SEARLE, attorney for appellant.

W. H. GEST, attorney for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was an action of *assumpsit* against the appellant by

the appellee to recover the price of publishing, in the newspaper of the latter, a list of all nominations made for office to be voted for in said Rock Island county, at the election held in November, 1894, as required by sections 2 and 19 of the act commonly known as the ballot law. The declaration avers the list of nominations was so published by the request and direction of judges of election, in said county.

A general demurrer to the declaration was by the court overruled, and appellant standing by its demurrer, judgment was rendered against it for \$100, from which this appeal is prosecuted.

In his argument, counsel for appellant insists that from the declaration, it can not be known who are the judges of election referred to in the declaration; whether the judges of one precinct, or the judges in all the county; and therefore, in this condition of uncertainty, the declaration must necessarily be bad on demurrer. The answer to this, however, is that the declaration follows the statute in this respect, and if the declaration is uncertain so is the statute; the declaration means the same as the statute. But the demurrer admits the declaration, if the facts are well pleaded, and inasmuch as the statute is followed, we can not say they are not; and with such admission, follow the conditions of the statute imposing a legal liability against the appellant to pay the expense of publishing the list of nominations; and the question argued does not arise in the case. Had the general issue been interposed to the declaration, an issue of both law and fact would then have arisen, imposing on the court the duty of determining the question argued as one of fact.

Perceiving no error in the record, the judgment of the Circuit Court will be affirmed.

American Glucose Co. v. William Lubitz.

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1. VERDICTS—*Against the Weight of the Evidence.*—This court is of the opinion that the verdict in this case is against the weight of the evidence, and hence the judgment must be reversed and the cause remanded.

2. CONTRACTS—*A Contract Construed.*—The court holds that the contract set out in the opinion in this case providing for the employment of appellee in the factory of appellant, while the same should remain in operation, was not abrogated by a temporary suspension, and that appellant was only to be released therefrom by a permanent cessation of business.

3. MASTER AND SERVANT—*Wrongful Discharge—Servant May Treat Contract as Continuing and Sue for Wages.*—A servant who is wrongfully discharged before the expiration of his term of service is not compelled to sue for a breach of the contract, but may treat it as continuing in force and recover wages as they fall due.

Assumpsit, for wages. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

STEVENS, HORTON & ABBOTT, attorneys for appellant.

W. T. WHITING and S. A. NIEBUHR, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by the appellee against appellant, upon the following written contract:

"It is mutually agreed between the American Glucose Co. and William Lubitz, that in consideration of a release of all claims and demands and causes of action which William Lubitz has against said company by reason of injuries sustained by him while in the employ of said company, on or about the 16th day of June, 1893, said American Glucose Co. hereby agrees to employ said William Lubitz at its factory in Peoria, while the same remains in operation, in some position of which he, in his present condition, can

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perform the duties, and to pay him the current wages for such services. Provided, however, that said Lubitz shall at all times be subject to discharge for reasonable cause.

THE AMERICAN GLUCOSE CO.

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In his declaration the appellee avers that he offered to perform the services required in said contract, and that the appellant without reasonable cause has wholly neglected and refused to employ the plaintiff at its factory in Peoria at such services and duties as he in his (then) present condition could perform, whereby he claims said wages, etc.

Under this contract appellee selected the position of attending the gluten tubs in the factory of appellant, and was by it employed and assigned to that work, and continued for some time so engaged at \$1.50 per day. The work was considered light and desirable by the other men in the factory. Among other duties attending the work with these tubs, was the requirement that they be plunged four times each day; that is, the sides of the tubs should be cleaned of a deposit of creamy substance collected there in the process of the manufacture of the product of the factory. This work was accomplished by means of a paddle or scraper in the hands of the operator, and from the evidence was a simple and easy process. Appellee soon objected to this work, and complained that it was too hard for him. A careful consideration of the evidence discloses the work was as easy and light as any that could be furnished in the factory; such work as any of the men would be glad to exchange for. It is difficult to find any good excuse for the objection of appellee to performing this work, and hard to believe his disability in any manner interfered with his accomplishing it with ease and comfort to himself. The foreman insisted that he could and should perform the work, whereupon appellee persisted in refusing, and was discharged by the appellant. Upon a trial of the issues by the jury, a verdict was returned against appellant for \$62.50 and the court having overruled appellant's motion for a new trial, gave judgment against it, from which it prosecutes this appeal, insisting the verdict is

against the evidence, the court gave improper instructions for the appellee, and refused proper instructions for the appellant, and erred in overruling the motion for a new trial.

We have given the evidence in the case a careful consideration, and are compelled to say we think the appellee was discharged from the service of the appellant for a reasonable cause, and inasmuch as the cause is to be remanded, we refrain from further comment upon the evidence.

Appellant's counsel complain of the refusal of the court to give the following instruction :

"You are instructed that the contract in evidence was only to continue in force while the factory of the defendant remained in operation; and if you believe from the evidence that when said contract was executed said factory was in operation, and that subsequently, in the summer of 1894, said factory ceased to operate for a considerable period, such suspension would be a termination of the period of said contract; that said contract does not mean that it shall continue so long as said factory is in Peoria, but so long as it remained in operation after the making of said contract."

We do not construe the contract the way the proposed instruction would do; the suspension of the factory referred to in the instruction was but temporary, while we think the contract has reference to a permanent cessation of business, and therefore the instruction was properly refused.

Counsel for appellant further contend the court erred in giving to the jury the following instruction for the appellee :

"3. The court further instructs the jury that if you find from the evidence that the plaintiff is entitled to a recovery in this action under the law, as given in the instructions in this case, the measure of damages to the plaintiff will be the amount of current wages as shown by the evidence the plaintiff could have earned in the employ of the defendant in its factory while the same remained in operation in Peoria, in some position, as shown by the evidence, of which he, the plaintiff, could perform the duties, from the date, as shown by the evidence, of the neglect or refusal of the defendant to employ the plaintiff in such position, after the

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date of the execution of the contract in evidence, to the date of the commencement of this suit, less the amount, if any, as shown by a preponderance of the evidence, the plaintiff has earned during such time, or could have earned during that time with reasonable diligence."

We are not willing to concede the justice of the criticism made by the counsel against this instruction.

As we construe the declaration in the case, the suit here is not for a breach of an entire contract, abandoned by appellee, but on the contrary, he avers he insisted on performance; it is a suit to recover wages fixed by the contract, and therefore limited to wages due at the time the suit was brought. The contract may be kept in force and wages recovered as they fall due. *Hamlin v. Race*, 78 Ill. 422; *Mt. Hope Cemetery Assn. v. Weidenmann*, 139 Ill. 67; *Trawick v. Peoria & Fort Clark St. Ry. Co.*, 68 Ill. App. 156. Appellant's counsel, as we understand them, insist the true rule is, in such cases, the suit must be upon a breach of the contract, and the measure of damages should be applied accordingly.

There exists in the authorities a class of cases to which the rule for which counsel contend is applicable, but we do not think the case presented is one of them, and are therefore of the opinion the instruction announced the correct rule of damages as applied to the declaration and the theory of the wrongful discharge, as contended for by appellee.

Because we think the verdict is against the weight of the evidence, and the court should, for that reason, have awarded to the appellant a new trial, the judgment of the Circuit Court will be reversed and the cause remanded.

Robert Scott v. Caroline H. Bassett.

1. *EQUITY—Rents and Profits Recoverable Under General Prayer.*—Where a bill in chancery for partition makes a proper case against a defendant for an accounting for the rents and profits of the land, such account may properly be taken under the prayer for general relief.

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2. *SAME—When Complete Relief may be Granted to all Parties.*—Where one of the parties in interest in a suit for partition files a bill correctly stating the rights and interests of all the parties interested in the premises, the suit becomes an amicable proceeding by such party for the benefit of all, and the court in such case may properly make all orders and decrees necessary to subserve the rights and interests of all the parties to the time of the final decree, in order that complete justice may be done and future litigation avoided.

Bill for Partition.—Appeal from the Circuit Court of Mercer County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

SCOTT & COOKE, attorneys for appellant.

BASSETT & BASSETT, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was a bill for partition filed by the appellee against the heirs of Robert W. Hyman, deceased, the appellee claiming one undivided one-seventh part of the land in question, under a conveyance made by Mary Martha Pender, one of the seven heirs of deceased, she not having been made a party to the bill. Appellant was made a party defendant to the bill and charged therein with having entered upon the land, under some claim, and taken the grass for six years, without right. Partition was decreed by the court among the respective parties entitled, and the premises being found not susceptible of division, were sold under the direction of the court, and the proceeds of such sale ordered distributed according to the rights and interests of the parties. The bill contained no special prayer for an accounting for the rents and profits against the appellant, but had the usual prayer for general relief, and under this, against the objection of appellant, an accounting was taken against him for the rents and profits for the six years during which he had occupied the premises, including the time of the pendency of the suit. By the final decree of the court appellant was ordered to pay \$182.80, being the rents of 1896, and six-sevenths of the

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rents of the five years next preceding, less credits for taxes paid, according to the report of the master.

Appellant seeks a reversal of this decree against him, contending it is erroneous because there was no special prayer in the bill for such relief against him; that rents could not be ordered paid on application of appellee alone, she having no interest therein, except for the last year, which substantially accrued during the pendency of the suit, and the latter could not in any event be allowed without supplemental bill claiming the same. We see no force in this contention. Where the bill, as in this case, makes and presents a proper case for an account of the rents and profits of the land against the defendant, such account may properly be taken under the general prayer for relief. *Haworth v. Taylor*, 108 Ill. 275. We are of the opinion also, where one of the parties in interest, in a suit for partition, files a bill correctly stating the rights and interests of all the parties interested in the premises, the suit then becomes an amicable proceeding by such party for the benefit of all, and the court in such case may properly make all orders and decrees necessary to subserve the rights and interests of all the parties to the time of the final decree, in order that complete justice may be done among all who are interested, and future litigation thereby be avoided; and this too, without reference to any special form of application. The order for the payment of rents in the case presented was such an order, and it will be affirmed.

The cross-errors having been stricken from the record under Rule 15 of this court, for failure to file the same in time, were not considered by the court. Decree affirmed.

Joseph P. Kellogg v. Belle F. Boehme et al.

1. *SET-OFF—In Distress Proceedings.*—A tenant against whom distress proceedings are instituted may avail himself of any set-off or other defense which would have been proper if the suit had been for rent in any other form of action, and is entitled, upon the filing of a proper

plea, to have his claims of every nature against the landlord considered, and allowed if found to be just.

2. *SAME—Extent of the Right in Distress Proceedings.*—The fact that the plaintiff in a distress warrant does not claim for previous years, does not prevent the defendant from bringing forward all his claims within the period of the statute of limitations, and items of set-off properly pleaded in such a case can not be excluded on the ground of a former suit pending for the same matters, no replication to that effect having been filed.

3. *PRACTICE—When a Case Goes to Trial Without Replication.*—If, when no replication is filed, a defendant goes to trial without objection in that respect, the replication must be treated as waived.

Distress for Rent.—Appeal from the County Court of Will County: the Hon. ALBERT O. MARSHALL, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

MORRILL SPRAGUE and A. E. MILLER, attorneys for appellant.

D. F. HIGGINS, attorney for appellees.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Appellees instituted distress proceedings in the County Court against the appellant for the rent of demised premises for the year ending March 1, 1896. Appellant had occupied the premises as tenant of the appellees since March 1, 1893. To the distress warrant, standing as the declaration in the case, appellant pleaded the general issue, and set-off.

No replication was filed to the latter plea. A jury was waived and a trial of the issues had by the court, resulting in a finding and judgment against appellant for \$336.62. From this judgment appellant prosecutes this appeal, the principal error complained of in his counsel's brief being the disallowance of the set-off, which it appears from the record the court disregarded. We find no warrant in the law for this action of the court. The defendant might avail himself of any set-off, or other defense, which would have been proper if the suit had been for rent in any form of

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action, and with like effect. Sec. 21, Chap. 80, Starr & Curtis. Under his plea of set-off appellant was entitled to have his claims of every nature against the appellees considered, and if found just, they should have been allowed, to the extent even, if the evidence proved it, of a final balance and judgment against appellees. The court should not, as it did, have disregarded any portion of the set-off. Appellant had no control of the pleadings of his adversaries in the suit, and could not therefore require them to claim in their distress warrant for previous years, if such claim existed, and the fact that such claim was not made, should not have been held to prevent appellant from bringing forward all his claims within the period of the statute of limitations, then in existence against the appellees. Such items of set-off could not properly be excluded on the ground of a former suit pending for the same matters, no replication of that nature having been filed.

It is urged by counsel for appellant, no replication having been filed to the plea of set-off, it was confessed. Having gone to trial without objection in that respect it operated as a waiver of the replication.

For the error specified the judgment of the County Court will be reversed and the cause remanded.

J. C. Smith et al. v. Herman W. Snow.

1. *VERDICTS—Not Supported by the Evidence.*—The court holds that the burden was upon the plaintiffs in this case to show the fair, reasonable and customary price or value of the printing for which they sought to recover, in the place where it was performed; that the statement by one of the plaintiffs that “we charge ten cents a line; and in this place, the common price is ten cents a line” was not sufficient, and that the verdict is not supported by the evidence.

Assumpsit, for printing. Appeal from the Circuit Court of Kankakee County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

W. R. HUNTER, attorney for appellant.

PADDOCK & COOPER, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Appellant being a member of the House of Representatives of the United States Congress, delivered therein two speeches, one on May 22, 1892, and the other June 18, 1892. Appellees being the publishers of a newspaper at Kankakee, in the district represented by appellant, commenced the publication of the speech of June 18, on August 22, continuing it in their weekly publication of August 29, September 2, 9, 17 and 23, and also published it in their daily issue, claiming these publications were made by request of appellant. A dispute arose between the parties concerning which of the speeches appellant had in fact requested the publication of, appellant contending it was the one of May 22, a short speech, the appellees, on the contrary, insisting it was that of June 18, a long speech. At the trial the jury returned a verdict for \$258.60 against appellant, and the court after overruling his motion for new trial gave judgment against appellant for that sum, from which he prosecutes his appeal to this court, assigning for error that there is no evidence to support the verdict, and the court erred in overruling the motion for a new trial.

In view of the errors assigned, we have carefully examined the evidence in order to determine their materiality.

The burden of proof rested upon the appellees to establish, by a preponderance of the evidence, every essential and material fact necessary to support the verdict as returned, in all its elements, including the amount of damages. This would require the appellees, by the same degree of proof, to show the fair, reasonable and customary price or value of the printing, for which they seek to recover, in the place where the work was performed. No evidence of such value appears in the record. The plaintiff, Collins, while a witness in the case, was asked by his counsel, a proper question to elicit such evidence, but for some reason, not disclosed

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by the record, no direct answer was given to the question, the witness simply stating, "we charge ten cents a line, and in this place the common price is ten cents a line." This we think falls far short of proving the fair, reasonable and customary price, or value of the work in the place where it was performed, and we are therefore of the opinion the verdict is not supported by the evidence, and the court erred in overruling the motion for a new trial.

For the error indicated the judgment of the Circuit Court will be reversed and the cause remanded.

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Chicago & Alton R. Co. v. James Stewart.

1. **ORDINARY CARE**—*Looking and Listening at a Railroad Crossing.*—In a suit against a railroad company for injuries received at a railroad crossing, the court finds that the plaintiff neither looked, listened nor thought of the train, and that he was therefore not in the exercise of ordinary care.

2. **SAME—Defined.**—Ordinary care is that degree of care which a reasonably prudent and cautious person would take to avoid injury under like circumstances.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Grundy County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1897. Reversed, with finding of facts. Opinion filed September 20, 1897.

GEORGE S. HOUSE, attorney for appellant.

S. C. STOUGH and JOHN STANSBURY, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against the appellant to recover damages for personal injuries sustained by him, in consequence, as he alleges, of the negligence of appellant in approaching and passing over the crossing of a street, or public highway, in the village of Coal City, town of Bracewood, Grundy county, July 8, 1896. It appears from the

evidence, on that day appellee was driving a team of mules, with wagon and empty hay rack, west on the street in question, which was to some extent piked. At the crossing of the railroad and highway, the former is slightly graded. While driving in the direction of the railroad, appellee sat on the wagon with his side toward the railroad, his back turned in the direction from which the train struck him; the mules were trotting until the railroad grade was reached, where they slackened to a walk as they passed upon the track. Appellee did not see or hear the approach of the train; the engine struck the front wheels of the wagon, threw appellee into the air and upon the ground, broke his collar bone and two ribs, and otherwise injured him, as was claimed, permanently.

At the close of all the evidence, appellant requested the court to instruct the jury to find a verdict for the defendant, which instruction the court refused to give. The verdict of the jury was returned against appellant in the sum of \$5,300. The court overruled appellant's motion for a new trial, and gave judgment against it on the verdict, from which this appeal is prosecuted. Among the errors assigned are, the refusal of the court to give the above mentioned instruction, and that the verdict is against the evidence.

After a consideration of all the evidence, we are compelled to the conclusion the verdict is not supported by it. The burden of proof was upon the appellee to show that at the time he received the injuries for which he seeks to recover damages, he was himself in the exercise of ordinary care to avoid injury. We not only think he has failed to do this affirmatively, but on the contrary we think the testimony of his own witnesses establishes the fact he did not approach the railroad crossing, where he was hurt, with ordinary care, and that it was in consequence of such want of ordinary care his injuries were incurred. The place where the accident occurred was open to view and well known to appellee. Others who were on the same highway, and near to him just before and at the time he was struck by the engine, heard and saw the train. Appellee, of all the sev-

eral persons in the neighborhood, was the only one, it appears, who did not see or hear the train. This fact, to us, proves he neither looked nor listened for the train, but doubtless in a state of thoughtlessness drove upon the crossing in a time of danger and was hurt.

Appellee himself and others of his own witnesses testified that he approached the crossing sidewise, his back toward the approaching train; and he says himself the mules were trotting, a movement with an empty wagon, on a piked street, that would be likely to produce a jar and rattling in the ears of appellee on the wagon, sufficient to obscure his hearing the approach of the train. These circumstances, with others that might be mentioned, leave no reasonable doubt, in our minds, that appellee neither looked, listened, nor thought of the train. He was, therefore, not in the exercise of ordinary care—that care which a reasonably prudent and cautious person would take to avoid the injury under like circumstances. *Chicago City Ry. Co. v. Dinsmore*, 162 Ill. 658.

It may be doubtful, under the evidence, whether appellant rung a bell, or sounded a whistle; and it may also be true it was running at a greater rate of speed than allowed by the village ordinance, if in fact the accident happened in the corporate limits of the village; still these facts in nowise constituted the efficient cause of the injury, which, as we have seen, was the want of ordinary care on the part of appellee himself.

The Circuit Court therefore erred in refusing to instruct the jury to find a verdict for the defendant, and the verdict was against the evidence; and for these errors the judgment of the Circuit Court will be reversed, and the clerk of this court directed to recite in the final order of this court the finding of facts hereto appended. Judgment reversed.

And the court finds that at the time the appellee sustained the injuries complained of in his declaration, he was not in the exercise of ordinary care for his own safety.

Byron D. Snell v. E. Tosetti Brewing Co.

1. PRACTICE—*Pleas Denying the Delivery of a Written Instrument Should be Verified.*—As the delivery of an instrument is an essential part of its execution, and as without plea verified by affidavit evidence can not be introduced tending to disprove the execution of a written instrument, it is not error to sustain a demurrer to pleas which deny the delivery of such an instrument, or assert that the delivery was wrongful, but which are not verified by affidavit.

2. WRITTEN INSTRUMENTS—*Can Not be Varied by Parol Evidence at Law—When Equity May Interfere.*—If by reason of fraud, accident or mistake any of the material terms of a contract be omitted from a written instrument, equity may reform it, but the relief can be had in that forum alone, and a plea alleging that a written contract does not contain all the terms of the agreement actually made between the parties, does not set up a good defense at law to a suit on such contract.

Debt, on a penal bond. Appeal from the Circuit Court of La Salle County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

H. M. KELLY, attorney for appellant.

WILLIAM D. FULLERTON, attorney for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

This was an action of debt on a penal bond for \$1,000 executed by appellant as surety for one Eugene Normandin, conditioned that the latter would pay for all beer he might purchase from appellee at \$4.75 per barrel, and would return empty packages, and use with proper care a certain horse and wagon. The breaches assigned were, that said Normandin did not pay for all beer purchased by him of appellee at said rate, and did not return all empty packages delivered to him by appellee. To the declaration the defendant pleaded *non est factum*, unverified by affidavit, not damaged, set-off, payment, and numerous special pleas. Demurrer was sustained to all pleas except the first, second and third original pleas and the fifth additional plea, being the pleas

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specifically named above, and upon these issues were formed and tried by jury, resulting in a verdict against appellant for \$250 damages, of which the court required a remittitur of \$8.67, and after overruling appellant's motion for a new trial gave judgment accordingly, from which he appeals to this court, assigning various errors upon the record. Much of the complaint of appellant's counsel relates to the ruling of the court by which the demurrer to the numerous special pleas was sustained.

The first, fourth, sixth and seventh additional special pleas relate to the delivery of the bond, and seek to deny that it was delivered, or, which is equivalent, to set up that it was wrongfully delivered by Normandin. None of these pleas being verified by affidavit, no evidence could have been introduced under them; therefore the sustaining of the demurrer by the court did the defendant no harm. The delivery of the instrument was an essential part of its execution, and without plea verified by affidavit evidence can not be introduced tending to disprove its execution. *Hunt v. Weir*, 29 Ill. 83; *Bailey v. Valley Nat. Bank*, 127 Ill. 340.

The second and third additional special pleas attempted to defend against the written contract, upon the averment that it does not contain all the terms of the contract actually made between the parties. This we think has never been held a good defense at law against the written contract. If by reason of fraud, accident or mistake any of the material terms of the contract were omitted from the written instrument, equity would reform it, but the remedy must be sought in that forum.

Much of the evidence offered by appellant on the trial, and which was excluded by the court, and of which complaint is made, was properly denied to the jury for the same reasons given for sustaining the court's action with reference to the special pleas.

Had appellant asked the trial court for leave to file an affidavit, verifying his pleas, during the trial, after these adverse rulings were made, no doubt is entertained it would have been granted, and the benefit of such defense obtained.

Not having done so, we find no error in the rulings of the court upon the pleas, or the admissibility of the evidence.

Complaint is made of the instructions given and refused and of excessive damages, but on examination we find no reversible error in those respects.

The judgment of the Circuit Court will be affirmed.

DIBELL, J., took no part.

David Lapsley v. R. L. Holridge.

1. **BROKERS**—*When Entitled to Commissions.*—A real estate broker is entitled to his commissions when he has furnished a purchaser with whom the principal enters into a valid contract, even though it be upon modified terms agreed upon between the principal and the vendee.

Assumpsit, for commissions. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1897. Reversed and remanded. Opinion filed September 20, 1897.

E. P. HARNEY and H. L. RICHARDSON, attorneys for appellant.

PADDOCK & COOPER, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee, being the owner of a large tract of land, agreed with the appellant that he would pay him \$1,000 if he would procure a buyer at \$26 per acre; this, the appellee admits, was the original contract, and if another existed, the burden was on him to prove it. Appellant entered into negotiations with one Rogers, took him to look at the land, after which Rogers offered to give \$26 per acre for it, providing he could trade some Nebraska land, and pay the difference in money; this proposition was communicated to appellee, who was thereby induced to go and see the Nebraska land.

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Upon his return, he told appellant if he made the trade by taking \$26 for his, and allowing \$7 for the Nebraska land, he would not pay appellant but \$500, to which appellant responded: "If the trade goes, I will expect my \$1,000 as you agreed." Appellee replied he would rather not make the trade, appellant still persisting for the \$1,000. The parties then separated. Appellee soon after sold to Rogers his land, consisting of over 1,139 acres, for \$29 per acre, taking in exchange, as part payment, over 960 acres of Nebraska lands at \$10 per acre. This contract was consummated between appellee and Rogers without the intervention of appellant. Appellee afterward offered appellant \$500 in full payment, which was refused. Later, on the assurance of appellee it would not bar the recovery of the balance, appellant accepted it in part payment. On the trial of the cause the foregoing facts appeared in substance, whereupon the jury gave their verdict for \$1 in favor of appellant, and the court, having overruled his motion for a new trial, he prosecutes his appeal to this court, and assigns, among other things, for error, the verdict is manifestly against the evidence, and the court erred in overruling the motion for a new trial.

Complaint is made, by counsel for appellant, of some of the instructions by the court to the jury, but inasmuch as the record discloses no exceptions in that respect, we can not consider the questions so made.

In *Wilson v. Mason*, 158 Ill. 304, it was said: "If the principal accept the purchaser thus presented, either upon the terms previously proposed, or upon modified terms then agreed upon, and a verbal contract is entered into between them, the commission is earned."

In *Hafner v. Herron*, 165 Ill. 242, citing numerous authorities, it was said: "It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commission."

In *Schuster v. Martin*, 45 Ill. App. 481, it was said: "If, while negotiations entered into by a broker are pending, the owner attempts to discharge the broker, and then himself completes the negotiations, and disposes of his property on substantially the terms submitted to the broker, the broker can not thus be deprived of his commission." See also *McConaughy v. Mahannah*, 28 Ill. App. 169.

We can perceive no substantial difference between the case presented to us, and those from which we have quoted, and therefore, under the facts proved, are of the opinion the appellant was entitled to his commission in accordance with the contract. Consequently the verdict was against the evidence, and the court should have awarded a new trial. The judgment of the Circuit Court is reversed and the cause remanded.

Singer Manufacturing Company v. Elonor Foster.

1. VERDICTS—*Upon Conflicting Evidence.*—The testimony of the witnesses in this case was conflicting and contradictory, and this court does not feel warranted in saying that the jury and the trial judge have made any mistake in their verdict and judgment.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Kankakee County; the Hon. THOS. F. TIPTON, Judge, presiding. Heard in this court at the May term, 1897. Affirmed. Opinion filed September 20, 1897.

W. H. SAVARY, attorney for appellant.

H. L. RICHARDSON, attorney for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee brought suit before a justice of the peace against the appellant, and recovered judgment for \$110 from which it appealed to the Circuit Court, where the case was tried by jury, resulting in a verdict and judgment against the appellant for \$115, from which it prosecutes this appeal to

Case Plow Works v. Edwards.

this court. The claim of appellee is based upon her alleged services to the appellant, at its request, as clerk in its office, for twenty-three weeks at \$5 per week, the appellant insisting the work, as much as was in fact done, was performed by the appellee for her husband, who was at the time employed by appellant.

No question is made here of the rulings of the trial court, either upon the evidence or the instructions to the jury, the only complaint being that the verdict of the jury is against the weight of the evidence. To determine this we have carefully examined the evidence contained in the abstract, and considered the briefs and arguments of counsel. The testimony of the witnesses before the jury was conflicting and contradictory; so much so that it would require the credibility of the opposing witnesses to be tested, before we could well determine on which side the weight of the evidence rests. The opportunities and advantages of the jury, and trial court, they seeing and observing the witnesses, to properly judge of their credibility, were so far superior to our own, that we do not feel warranted in saying they have made any mistake in that respect, and the judgment of the Circuit Court will therefore be affirmed.

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J. I. Case Plow Works v. Isaac C. Edwards, Assignee.

1. VOLUNTARY ASSIGNMENTS—*Liability of the Assignee.*—If an assignee has acted with good faith, exercised fair discretion, and dealt in the same manner he would ordinarily do in regard to his own property, and has managed the trust property with reasonable diligence, he ought not to be subject to losses occurring in the management of the property, or be made responsible for a mistake in judgment.

2. SAME—*An Assignee Held Not Liable for Losses.*—The court is of the opinion that the evidence in this case furnishes no basis for impeaching the acts of the assignee for fraud or bad faith, and finds that he has exercised fair discretion, and has acted in the same way that an ordinary person would do in regard to his own property; that in all things in relation to the trust property he has used reasonable diligence, and that he ought not to be held responsible for losses occurring in the management of such property.

3. *SAME—Assignees Should Defend Against Suits.*—It is the duty of an assignee to defend the property of the estate in case any suit is brought respecting it, whether such property be real or personal, and to give notice of such suit to his *cestui que trust*, if it may be useful and practicable.

4. *SAME—When Assignee Should be Charged with Interest.*—If an assignee makes interest on the funds in his hands, he should be chargeable with the payment of interest, but the evidence should affirmatively show the amount with which he is to be charged, or the time for which he is liable ought to appear, to furnish a proper basis for computation.

5. *SAME—An Assignee Held Not Personally Liable for the Costs of a Suit.*—The order against appellee for costs is uncertain, and should be modified so as to direct the costs to be paid from funds in his hands as assignee, as no reason is perceived why he should be adjudged to pay the costs personally.

Assignment Proceedings.—Appeal from the County Court of Peoria County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1897. Affirmed in part, reversed in part, and remanded with directions. Opinion filed September 20, 1897.

JACK & TICHENOR, attorneys for appellant.

GEORGE B. FOSTER, attorney for appellee; DAVID E. POWELL, of counsel.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Kirkwood, Miller & Co., engaged in a general implement and farm machinery business at Peoria, being in failing circumstances, on the 31st day of December, 1892, made an assignment to the appellee under the provisions of the act concerning voluntary assignments for the benefit of creditors. The business of the insolvents included a branch establishment at Cedar Rapids, Iowa, also embraced in the assignment. The business of this firm had been extensive, attended with much detail, and the property comprised numerous and distinct varieties of implements and articles of trade, in the aggregate amounting to many thousands of dollars, and out of which grew several complications and consequent litigation, by reason of the claims of other parties to a part of the property supposed to belong to the insolvents. Appellee accepted the assignment, and entered

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upon the execution of the trust imposed upon him, as provided by law, and in pursuance thereof filed with the clerk of the County Court, as he then understood it, a true and full inventory and valuation of said estate under oath, so far as the same had come to his knowledge. In consequence of the variety of the property and magnitude of the business involved, from necessity and in conformity to the common usages the assignee employed several persons, including one or more of the old employes of the insolvents, to assist him in obtaining the necessary information to prepare and file the inventory required of him as such assignee. These persons so employed made the invoices and valuations of the property supposed to be on hand from which the final inventory was made and filed. Several suits at law were commenced in Iowa, where a part of the property was located, involving the right of the assignee to the same. Appellee, with the advice and consent of a number of the creditors of the assignors, employed attorneys in that State to protect the interests of the estate in the property in litigation. It was required also that the assignee as soon as practicable convert the assets of the insolvents into money, that it might be distributed to the creditors, and for that, as well as other necessary purposes, as the care and management of the property, he retained in his service several of the clerks and salesmen, who previous to the assignment had been in the employment of the assignors. The care, management and disposition of property of this nature, located as it was, would naturally be attended with expense. From necessity and common usage, the assignee must act by other hands than his own. The same duties devolved upon the assignee with respect to the estate, as would be required of any other trustee. The same elementary rules of equity applicable to other trustees, would also govern the conduct of the assignee, and it therefore is pertinent to inquire concerning them, and apply them justly to the facts presented.

By reference to Story's Eq. Jur., Vol. 2, Sec. 1269, it is said: "In respect to the preservation and care of trust

property, it has been said that a trustee is to keep it, as he keeps his own. * * * The rule, in all cases of this sort, is, that when a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses." Sec. 1271: "It has been remarked by Lord Hardwicke, that these rules should not be laid down with strictness to strike terror into mankind acting for the benefit of others, and not for their own; and that, as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to loss, which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." Sec. 1272: "But it would be difficult to affirm that the rules of the courts of equity have always proceeded upon so broad and liberal a basis. The true result of the considerations here suggested would seem to be that where a trustee has acted with good faith, in the exercise of fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for losses occurring in the management of the trust property." Sec. 1275: "In relation to trust property, it is the duty of the trustee, whether it be real estate, or personal estate, to defend the title at law in case of any suit being brought respecting it; to give notice, if it may be useful and practicable, of said suit, to his *cestui que trust*: * * * Finally, he is to act in relation to the trust property, with reasonable diligence." Sec. 1277: "In regard to interest upon trust funds, the general rule is that if he has made interest upon those funds, or ought to have invested them so as to yield interest, he shall in each case be chargeable with the payment of interest."

From what we have quoted from the learned commentator, it may be deduced that the correct rule is that if the assignee has acted with good faith, in the exercise of fair

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discretion, and in the same manner as he would ordinarily do in regard to his own property, and has acted with relation to the trust property with reasonable diligence, he ought not to be subject to losses occurring in the management of the property, or be made responsible for a mistake in judgment. Applying these plain and just rules to the case presented will, it is believed, result in a proper conclusion.

Appellee filed his report in the County Court, to which appellant and other creditors of the insolvents objected. On the hearing the court sustained the same to the extent of adding \$9,349.70 to the balance reported by the assignee, and otherwise the objections were overruled. Appellant prayed and perfected this appeal and assigns for error the overruling of a part of its objections, and appellee has assigned cross-errors calling in question the action of the court whereby the items composing the \$9,349.70 were added to such balance. As to the objections that were by the court overruled, we do not think an extended discussion would subserve any good purpose. We have carefully examined the evidence and feel warranted in the conclusion the court decided correctly as to all those matters. In support of its objections appellant charges appellee with carelessness, bad faith and fraud in the management and disposition of the property and funds confided to him; especially in the employment and payment for the services of Mills & Keeler, attorneys in the Iowa litigation, and the retention in his service and payment therefor of Stewart and Henning and other old employes of the insolvents; and also in the sales and disposition of certain of the assets of the estate. After a full and careful examination of the evidence contained in the very voluminous abstract, and a faithful consideration of the extended briefs and arguments of the counsel of the parties, we find no basis for impeaching the acts of the assignee for fraud or bad faith; and we also find in those respects of which complaint is made, he has exercised fair discretion, and has acted in the same way an ordinary person would do in regard to his own property, and that in all things in relation to the trust property, he has acted

with reasonable diligence, and therefore he ought not to be held responsible for losses occurring in such management. It has already been seen that it was the duty of the assignee, whether it be real estate or personal estate, to defend the title at law in case any suit be brought respecting it, and to give notice, if it may be useful and practicable, of such suit to his *cestui que trust*.

It may be admitted the assignee in his management of the property has done and left undone things that from a retrospective standpoint, ought to have been omitted, or performed differently, still, the just way is to view his acts prospectively; for in that manner only can it be properly determined what a reasonable person would do under given circumstances. Applying this test, no difficulty should be experienced in sustaining the acts of the assignee on honest grounds.

The court sustained objections to items of \$870 and \$243.15, being parts of the salaries of Stewart and Henning, respectively, they being two of the employes of the insolvents retained in the service of the assignee, and to \$490.54, part of the attorney fees paid to Mills & Keeler. We think these items were proper credits in the account of the assignee, and it was error to reject them.

It has been seen that much of the work necessary to be performed by the assignee was proper to be done by the hands of others. In the exercise of fair discretion, the appellee employed other persons to make the inventory filed by him. On the hearing A. H. Harris, the secretary of the appellant, was permitted to testify as to the manner in which he had compared "Exhibits A and B," which were admitted in evidence, showing an apparent shortage in the account of appellee of \$5,257.30, one-half of which the court charged against the assignee. This alleged shortage was made to appear by a comparison of the reports and inventory, and from other information obtained by Harris in different ways, and as an instrument of evidence in the case is, in our judgment, without value. It is merely the opinion of Harris based on his own conclusions and hearsay evidence. It is

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clear from the testimony that the inventory, made by the persons employed for that purpose, contained the description and valuation of many articles not on hand at the time of the assignment. This discrepancy arose in part, by accepting marks and tags on packages as evidencing the correct description and number of the articles, when in fact the property, or large portions of it, had been disposed of before the assignment. Again, many of the implements were in a condition known as "knocked down;" that is, the parts were separated, stored in different places in the building, and in that way much of the property became duplicated on the inventory. The assignee declared on oath that he had sold all the goods that came to his hands, and had accounted for them as either sold or on hand, and we think, in view of all the evidence, his statement is uncontradicted by competent evidence.

The action of the court, therefore, by which the assignee was charged with \$2,628.85, as shortage, was unwarranted and erroneous.

We do not find sufficient evidence in the record upon which to charge the assignee with the interest item of \$2,434.18. If he has made interest upon the funds in his hands, he should be chargeable for the payment of interest, but the evidence should affirmatively show the amount with which he is to be charged, or the time for which he is liable ought to appear, to furnish a proper basis for computation. If the assignee made interest it would be easy to show the fact and charge him accordingly. The order against appellee for costs is uncertain. It should be modified so as to direct the costs to be paid from funds in his hands as assignee. No reason is perceived why he should be adjudged to pay the costs personally.

For the errors indicated the order of the County Court will be reversed on the cross-errors as to the specified items and costs, at the cost of the appellant; and in all other respects the order of the County Court will be affirmed and the cause remanded to that court with directions to allow in the account of the assignee credit for

all salaries paid to Stewart and Henning, and all the attorney fees paid to Mills & Keeler, and to reject the charge for alleged shortage, and to retry the case on the interest item.

Order affirmed in part, reversed in part and cause remanded with directions.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1893.

William G. Cooke v. Emma L. Cooke.

1. **ADULTERY**—*Charge of, Held Sustained by the Evidence.*—The court discusses the evidence in this case and holds that on such evidence delivered orally in the presence of the trial judge, his decision as to where the truth lies can not be questioned, and that the decree for divorce on the ground of adultery must be affirmed.

Divorce.—Appeal from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding. Heard in this court at the October term, 1893. Affirmed. Opinion filed February 1, 1894.

BAERNUM, HUMPHREY & BAERNUM, attorneys for appellant.

F. M. WILLIAMS and F. W. BLAIR, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee filed this bill for a divorce from the appellant charging him, *inter alia*, with adultery. This charge the court found to be true. The only question presented by the brief of the appellant is whether that finding is consistent with the evidence.

That these parties are still young—that for four or five years before the trial, between them “the rites mysterious of connubial love” had been suspended—that he was much in the habit of spending his evenings in not infrequent

drinks, billiards, and attending the theatres—is abundantly shown by the record.

The charge of adultery rests mainly—indeed it may be said wholly—upon the testimony of the appellee, two detectives, a girl who did the housework for these parties, and one lawyer not connected with this case, who all say (they being specially engaged in watching) that on the night of January 27, 1892, the appellant went to a house (we will not make this opinion a directory) a little after eleven o'clock, and was there seen with a woman lightly clad—though the witnesses differ in describing the color and name of the garment—seated on his lap.

The going to the house is not denied, but the woman, as well as the inferred character of the house, is denied by the appellant and several witnesses. And four of these witnesses for the appellee and one other for her, testify that the appellant left the house the next morning between nine and half past nine o'clock, while he and his witnesses say that he remained in the house but a few minutes.

Other visits to other houses were alleged and admitted, but the duration of the stay denied. One being accounted for on the plea that the appellant knew that he was being followed and wanted to, but did not, discover by whom—and the others, to places whose proprietors were feminine, as being business calls, in his professional character as a lawyer, made at convenient hours shortly before midnight, except one, which was ended as early as nine o'clock.

On such testimony, delivered orally in the presence of the judge of the Circuit Court, his decision as to where the truth lay can not be questioned, and the decree must be affirmed.

M. C. Jennings v. William C. Heinroth.

Same v. John A. Bartine.

1. *VENUE—Petition for Change of, Should be Verified.*—A petition for a change of venue which is not verified by the affidavit of the petitioner may properly be disregarded.

2. *JURORS—Questions as to Competency of, Should be Raised in the*

Jennings v. Heinroth.

Trial Court.—That the same jurors were allowed to pass on both of the cases decided in this opinion is held to be immaterial, as no objection to such a course, or to any juror was made.

8. *SAME—Errors in Spelling the Names of, Immaterial.*—The fact that the clerk of a court spelled the names of jurors differently from the way such jurors thought was the proper mode does not establish that the persons actually signing the verdict were not those who were sworn to, and did try the case.

Trespass on the Case, for a malicious prosecution. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

M. C. JENNINGS, appellant, *pro se*.

No appearance for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Each of these suits was an action for malicious prosecution, the *ad damnum* in each being \$10,000.

It is said that a petition for a change of venue was filed in each, upon which no order was made.

As neither petition was verified, each was properly disregarded.

A trial was had in each, in the absence of the defendant, appellant.

As nothing was presented to the court below showing why a trial should not be had, the court properly proceeded in the absence of appellant.

Each cause was at issue, replications having been filed to the pleas of appellant.

Each bill of exceptions shows that evidence was heard at the trial, and each contains an excuse by appellant (inability to obtain the shorthand notes) for not inserting the same in the bill.

The instruction given in each case was in accordance with the law.

That the same jurors who had rendered a verdict in the case of *Bartine v. Jennings* were sworn to and did try and

render a verdict in the cause of Heinroth v. Jennings is immaterial. No objection to such trial or to any juror was made.

It does not appear, as is urged, that the jurors sworn were not those who rendered the verdicts. The fact that the clerk spelled the names of three jurors differently from what such jurors thought was the proper mode, does not establish that the persons actually signing the verdict were not those actually sworn and trying.

As a verdict and judgment of but \$100 was rendered in each case, the appellant, defendant in *ex parte* trials of malicious prosecution cases, appears to have had a fortunate escape.

Each judgment of the Circuit Court is affirmed.

E. A. Moore Furniture Company v. George C. Prussing.

H. H. Sherwood v. Same.

William J. Moore v. Same.

Ezekiel P. Murdock v. Same.

1. **CREDITORS' BILLS—Attacking Fraudulent Transfers of Personal Property.**—Under Sec. 49, Chap. 23, R. S., which is but affirmative of the old law, the right of a judgment creditor to file a bill to subject to sale, personal property which has been transferred in fraud of the rights of creditors, can hardly be questioned.

2. **SAME—Right of Creditor to Levy on Property Not Necessarily an Objection to.**—Where a creditor has fraudulently conveyed his personal property without consideration, and to defraud his creditors, the sale may be impeached and relief granted by a court of equity, as the remedy at law by a sale of the property on execution is inadequate.

3. **PARTNERSHIP—Marshaling Assets.**—The rule of equity as to marshaling assets, to pay partnership debts with partnership assets, and individual debts with individual assets, is based on the equity of a partner that his property shall not be applied to the payment of the debt of anybody else, whether partner or stranger, and when both partners are debtors neither of them has any such equity.

4. **SAME—Jurisdiction of Equity over Suits Against Representatives of a Deceased Partner.**—The jurisdiction of courts of equity over suits

Moore Furniture Co. v. Prussing.

against the representatives of deceased partners is not affected by the statutory jurisdiction of the Probate Court.

5. *RECEIVERS—Appointment of, Without Notice.*—Where the property sought to be reached by a creditor's bill was of a kind easily put out of reach, and where, had an injunction been issued, it would have been very difficult to prove a breach, had one been committed, the court holds that the only way to make sure that the complainant, if entitled to relief, would get it, was to put the source of relief into the custody of the law, and approves the appointment of a receiver, without notice, under the particular circumstances.

Creditor's Bill.—Order appointing a receiver without notice. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

PAM & DONNELLY and MOSES, ROSENTHAL & KENNEDY,
attorneys for appellants.

SIGMUND ZEISLER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order, granted without notice, appointing a receiver of the assets of the appellant.

The bill stated a case which—as to material facts to be considered on this appeal—may be condensed as follows:

December 8, 1893, James E. Moore and William J. Moore were the sole partners of a furniture firm, and then, not in the firm name, but individually, made five promissory notes, each for \$2,500, payable to their own order, which they indorsed to the appellee.

On one, becoming due in six months thereafter, the appellee obtained judgment against them both, and issued execution which was returned no property. He also sued on the other notes, becoming due one year after date, and pending that suit James E. Moore died, and the appellee obtained judgment against William J. Moore only, upon which also execution was returned no property. Upon these four notes the claim of the appellee has been allowed in the Probate Court against the estate of James E. Moore, but the estate has no assets with which to pay any part of the claim.

On the same day that the notes were made the two Moores began the organization of the appellant corporation, the certificate for which was issued by the Secretary of State, December 28, 1893.

As between themselves and the subscribers for the stock of the corporation, the stock all belonged to the Moores, and they procured the organization of the corporation for the purpose of putting their stock of furniture, choses in action, and subsequent additions thereto, beyond the reach of their creditors.

Until the death of James E. Moore, both the Moores controlled the whole business, as has William J. Moore, since, and all profits thereof not kept in the business, have been divided between them during the life of James E. Moore, and between his family and William J. Moore since the death of James E. Moore.

This condensation omits a great deal of what is contained in the bill of twenty-seven typewritten pages, but omits nothing that qualifies what has been stated.

Under Sec. 49, Ch. 22, which introduced no new principle, and is but affirmative of the older law (*Singer & T. S. Co. v. Wheeler*, 6 Ill. App. 225, *Durand v. Gray*, 129 Ill. 9), the right to file a bill in order to sweep the fraud out of the way can hardly be questioned.

The facts that before the organization of the corporation the assets were partnership assets, and the notes made, not as a firm, but individual notes, are not material, as the equity rule of marshaling assets to pay partnership debts with partnership assets, and individual debts with individual assets, is based on the equity of a partner that his property shall not be applied to the payment of the debt of anybody else, whether copartner or stranger. *Ladd v. Griswold*, 4 Gilm. 25.

When both parties are the debtors, neither of them has any such equity. *McIntire v. Yates*, 104 Ill. 491, is in point in principle.

There is in the record an affidavit by one of the solicitors of the appellant by which he evidently intended—and failed

—to state that an appeal had been taken from the allowance in the Probate Court of the claim against the estate of James E. Moore.

If such fact were before us, it would make no difference, for the inherent jurisdiction of courts of equity over suits against the representatives of deceased partners (*Eads v. Mason*, 16 Ill. App. 545) is not affected by the statutory jurisdiction of the Probate Court (*Latham v. McGinnis*, 29 Ill. App. 152), and the appellee might have refrained from going there at all.

The two serious difficulties in the way are, first, that for aught that appears, there was enough tangible property accessible upon which to levy, that, upon the statements of the bill, belonged to William J. Moore as surviving partner, and with the sale of which under execution the representatives of James E. Moore could not have interfered; and as the receiver is appointed as to all the assets, if the order is wrong as to the tangible property, it should be reversed.

The Supreme Court of Wisconsin dealt with this objection, and held against it in *Gulickson v. Madsen*, 87 Wis. 19, to which I refer without quoting.

Second, the order was entered without notice.

We have used some pretty strong language in reference to such proceedings, in *Nusbaum v. Locke*, 53 Ill. App. 242. This case, however, is one of "emergency," as there spoken of.

The property, both tangible and intangible, was of a kind easily put out of reach.

Had an injunction been issued, it would have been very difficult to prove a breach, had one been committed. The amount involved is very considerable.

The only course open to make sure that the appellee, if entitled to relief, would get it, was to put the source of that relief into the custody of the law. We do not mean to imply that the court should appoint a receiver when and because the complainant will give a good bond to pay all damages, but we highly commend the prudent course adopted in this case of taking such a bond in the penalty of twenty-five thousand dollars.

Three other appeals by persons connected with the corporation are pending here upon the same abstract and briefs. Names need not be recited here.

The order appealed from will be affirmed in each.

Michael Poznanski v. John Szczech.

1. APPELLATE COURT PRACTICE—*Failure of an Appellee to File Briefs as Ground for Reversal.*—For a failure by an appellee to file briefs, the Appellate Courts in some of the districts will sometimes reverse judgments. This, however, is done under rules, and there is no such rule in this (the first) district.

2. NEGLIGENCE—*Verdict as to, Sustained.*—A carpenter built a scaffold at the side of a house, but did not brace the supports, and while another carpenter was at work upon it, it fell and he was injured. In a suit to recover damages for the injuries received, it was shown that the fact that the scaffold was not braced was as obvious to the plaintiff as to the defendant; and that both were carpenters, and, presumably, equally capable of judging as to its sufficiency. *Held*, on appeal, that a verdict in favor of the defendant was right on the facts.

3. NEW TRIALS—*On Account of the Inability of a Party to Attend the Trial.*—Where, by a succession of misfortunes, a party was prevented from attending the trial of his case, *it was held*, that if upon a proper showing his testimony would have put a different light upon the facts, he would have been entitled to a new trial, and that no such showing having been made, a new trial was properly refused.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

MORGENSTERN & DICKISON, attorneys for appellant.

No appearance for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

From various cases cited by the appellant we infer that for failure by an appellee—as in this case—to file briefs, the Appellate Courts in some of the other districts will

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sometimes reverse judgments. This, however, is done under rules, and this court has no such rule.

There is no doubt of the exact circumstances under which the appellant sustained injuries for which he sued the appellee. They were both carpenters, and the appellant worked for the appellee. The appellee built a scaffold alongside of a house, the supports of the scaffold not being braced outside of the house. The appellant was at work upon it and it fell with the weight of lumber piled, and of another workman climbing upon it.

The fact that the scaffold was not braced was as obvious to the appellant as to the appellee, and both being carpenters, they were presumptively equally capable of judging as to the sufficiency of it.

The appellant makes no complaint of the instructions, and the verdict was right upon the facts. By a succession of misfortunes the appellant was prevented from attending at the trial, and if his testimony could have put any different face upon the facts, a new trial should have been granted. It is not claimed that his testimony could have had such effect.

The judgment is affirmed.

H. B. Paul and J. T. Gill v. Tot M. Paul.

1. *CONTRACTS—Construction of.*—The presumption of law is in favor of the legality of a contract; and therefore, if it be reasonably susceptible of two meanings, one legal and the other not, that interpretation shall be put upon it which will support and give it operation.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

EDGAR BRONSON TOLMAN, attorney for appellants.

W. A. FOSTER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action upon a promissory note given to the appellee for part of the arrears of alimony due in a separate maintenance suit from one now dead, and never a party to this suit.

The defense is that among the terms of a settlement, was one that appellee should file a bill for divorce from her husband, which he would not defend, and that upon that bill a decree should be entered against him, with a gross sum for alimony in both the divorce and separate maintenance cases, secured by notes of which this is one; and there is in the evidence ground for a very strong suspicion that the defense is true.

But the court held all propositions of law presented by the defendants, and decided the case against them upon evidence giving color to the theory that the settlement of the arrears of alimony was independent of the subsequent divorce; and the defense is so inequitable that no court would sustain it if it could be avoided.

The judge, trying the case without a jury, had the advantage—which we have not—of seeing the witnesses, and we will not set aside his conclusion.

The arrears were nearly fifty per cent more than all securities given for the payment of the sum agreed upon, and it may well be held that while the agreement for obtaining a divorce induced the husband and his relatives to give security for the compromise sum, yet the consideration for those securities was the debt of record which the husband owed the wife, and that the agreement to procure a divorce was collateral only.

Instances of similar arrangements often occur between brewers and their customers, in which the brewer guarantees rent, and agrees to furnish fixtures, and the customer undertakes to buy beer only from that brewer at an agreed price.

In such a case the consideration of a note given for the price of beer could not be attacked for failure of the brewer to comply with the agreement as to fixtures, although such failure might perhaps be the basis of a counter-claim.

Barnett v. Marks.

“The presumption of law, however, is in favor of the legality of a contract; and therefore, if it be reasonably susceptible of two meanings—one legal and the other not—that interpretation shall be put upon it which will support and give it operation.” Chit. on Contracts, 977.

The judgment is affirmed.

Lena Barnett v. Deborah Marks.

1. **HUSBAND AND WIFE—*Liability of Wife for House Rent.***—In a suit against a wife for the rent of a dwelling house leased by her husband, it was shown that the wife occupied the premises, or a part thereof, from the beginning of the lease until some time in the last month of the term. *Held*, on appeal, that the trial court properly refused to hold the following proposition of law: “If any portion of the premises described in the lease introduced in this cause was sublet by the tenant to any other person than his wife, * * * and were occupied by such person, then the defendant is not liable in this cause.”

2. **SAME—*The Husband Not a Necessary Party in a Suit for Family Expenses.***—The liability of a wife for family expenses is several as well as joint, and it is not necessary to a recovery against her that there should also be a recovery against her husband, and if there is no judgment against him in a suit before a justice, it is not necessary that he should be a party on appeal.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

BLUM & BLUM, attorneys for appellant.

J. M. LONGENECKER and S. J. McCALL, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant concedes that house rent is a family expense for which, under our statute, both husband and wife are

liable, whether the wife signed the lease or not, but insists that where the husband alone signs the lease and then sublets a portion of the premises to any other person who proceeds to occupy such sublet part, the wife is no longer liable; and it is assigned and argued as error that the trial court refused to hold the following proposition of law, viz.:

"That if any portion of the premises described in the lease introduced in this cause was sublet by Abraham Barnett to any other person than Lena Barnett, his wife, for the month of April, 1896, and were occupied by such person or persons to whom sublet, then the defendant, Lena Barnett, is not liable in this cause."

Such proposition was rightly refused.

Although it seems to have been established that some time after the making of the lease, and the occupancy of the premises by the appellant, a part of the house was sublet, it was sufficiently established to justify the trial court in finding that appellant remained in the premises, occupying the same, or a part thereof, as the home of herself and some of the younger children of herself and her husband, from the beginning of the lease continuously until some time in the last month of the term, which was the month for which the recovery was had. No such evasion of the statute as the refused proposition of law would uphold, should be tolerated. It would be an encouragement to the fraud that the statute was enacted to prevent (Sec. 15 of the Husband and Wife Act), and appellant cites no authority in support of the proposition.

It is further contended that appellant's co-defendant, Abraham Barnett, was not brought into the case in the Superior Court either by service of an appeal summons, or by his entry of appearance, until after the cause was placed upon the short cause calendar; and was never served with notice to place the same upon said calendar.

That contention may be briefly disposed of by saying that the abstract of record which is presumed to present everything that is material to the appellant's case, does not show that any judgment was ever recovered against Abraham Barnett before the justice of the peace.

Barnett v. Marks.

The liability of the appellant, under the statute, was several, as well as joint with her husband, and it was not necessary to a recovery against her that there should also be a judgment against him, and if there were no judgment against him before the justice, it was not necessary that he should be a party before the Superior Court.

No error appearing, the judgment is affirmed.

RULES OF PRACTICE
OF THE
APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT,
ADOPTED JUNE 27, 1897.

On this 25th day of June, A. D. 1897, the same being one of the judicial days of the February term, A. D. 1897, of the Appellate Court of Illinois for the Fourth District, begun and holden at Mt. Vernon, Illinois:

Ordered: That all rules of practice heretofore adopted by this court be and the same are hereby annulled; and the following rules be and the same are hereby adopted in lieu thereof, which the clerk will spread upon the minutes.

RULE 1. Writs of error—Supersedeas.—No supersedeas will be granted unless a transcript of the record on which the application is made be complete, and so certified by the clerk of the court below, with an assignment of errors written on or appended to the record. Nor will the supersedeas issue until the bond be filed with the clerk according to the order granting the supersedeas. And on every application for a supersedeas, an abstract of the record, with a brief, containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, shall be presented with the record to the court or justice to whom the application is made. Every such application, whether made in open court, or to a justice in vacation, must be accompanied by an affidavit showing the solvency of the proposed surety.

RULE 2. Bond.—Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question; in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

RULE 3. Writ of error made a supersedeas.—When a writ of error shall be made a supersedeas, the clerk shall indorse upon said writ the following words: “This writ of error is made a supersedeas, and is to be obeyed accordingly,” and he shall thereupon file the writ of error with the transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the clerk to issue a certificate, in substance as follows, to-wit:

*Office of the Clerk of the Appellate Court for the
Fourth District of the State of Illinois.*

I do hereby certify that a writ of error has issued from this court for the reversal of a judgment obtained by..... vs....in the....Court of.....at the.....term.....A. D. 18.., in a certain action of.....which writ of error is made a supersedeas, and is to operate as a suspension of the execution of the judgment, and, as such, is to be obeyed by all concerned.

Given under my hand and the seal of the said Appellate Court, at Mt. Vernon, this.....day of.....A. D. 18..
.....Clerk.

RULE 4. Writ of error, to whom directed.—Writs of error shall be directed to the clerk of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court; but where the plaintiff in error shall file in the office of the clerk of this court a transcript of the record duly certified to be full and complete, before writ of error issues, it shall not be necessary to send such writ to the clerk of the infe-

Rules of Practice.

rior court, but such transcript shall be taken and considered as a due return to said writ.

RULE 5. Process on writs of error.—The process on writs of error shall be a scire facias to hear errors, issued on the application of the plaintiff in error to the clerk, directed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in court, and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the scire facias be not returned executed, an alias and pluries may issue without an order of court.

RULE 6. Return day of process.—The first day of each term shall be return day for the return of process, and no party shall be compelled to answer or prepare for hearing unless the scire facias shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless the defendant shall have given the plaintiff ten days' notice, before the term, of his intention to enter his appearance, and have the cause proceed to a hearing.

RULE 7. Time of service.—In all cases in which a writ of error is made a supersedeas, the plaintiff in error shall, on filing the record with the clerk, at the same time order and direct a scire facias to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on failing to do so, the defendant in error shall have the right to a hearing at the same term after joining in error, without giving ten days' notice as required by Rule 6: *Provided*, if there be not ten days between the allowance of the supersedeas and the sitting of the court, the cause shall stand continued until the next term, unless by consent of the parties it shall be otherwise ordered.

RULE 8. Notice to purchasers and terre-tenants.—In all cases wherein guardians, executors or administrators, or others acting in a fiduciary character have obtained an order or decree for the sale of lands in causes *ex parte*, and a sale

has been had under such decree or order, and the same shall be brought to this court for revision, the purchaser of terre-tenants of such lands, if known, shall be suggested to the court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error, ten days before the first day of the term of court to which the writ of error is returnable, so that said terre-tenants may appear and defend.

RULE 9. Records of inferior courts—How prepared.—Hereafter, the clerks of the inferior courts in this State, in cases of appeal and of error, in making up “an authenticated copy of the records of the judgment appealed from,” or in sending up a transcript of the record to this court as a return to a writ of error, shall certify to this court: First, a copy of the process. Second, the pleadings of the parties, respectively. Third, the verdict in jury trials. Fourth, the judgment of the court below, whether tried by the court or jury. Fifth, all orders in the same cause made by the court. Sixth, the bill of exceptions. Seventh, the appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account or other document or writing, or other matter, which, according to the decisions of this court, have been held to constitute no part of the record of a cause. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

RULE 10. Arrangement of the record.—The clerk of the court below shall arrange the several parts of the record aforesaid according to their chronological order, and shall tax thereon his fees for making the same. The clerk of this court shall not tax as costs in this court any matter inserted in such transcript contrary to the rule.

RULE 11. Parties may indicate what files are to be copied.—The party or his attorney may, by *præcipe*, indicate to the clerk, and direct what of the files of the cause shall be copied into the record; and, in such case, if the record shall be insufficient, it shall be supplied at his costs, and, if unnecessarily voluminous, he shall pay the costs accrued on account of the copying of such unnecessary matters.

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RULE 12. Time for filing records—Hearing docket.—No case brought to this court by appeal shall be placed on the court docket for hearing, unless the record is filed within the time now prescribed by law (see Sec. 73, Chap. 110, Practice Act), or within the further time allowed by the court for filing the record, except in extraordinary cases; the court, upon special application, may order a cause to be placed on the hearing docket.

RULE 13. Placing of causes on the docket.—No case which may be brought to this court on writ of error, shall be placed on the court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the court for filing the same, except in extraordinary cases; the court, upon special application, may order a cause to be placed upon the hearing docket.

RULE 14. Removing records.—No person shall remove from the office of the clerk any record of this court, except upon special leave granted for that purpose. No record shall be taken from the files of the court, except on application therefor to the clerk or his deputy, and it is made the duty of the clerk to report promptly to the court every violation of this rule. The clerk shall be held responsible for the safe keeping and production of the records. Application for leave to remove records may be considered at any time in the discretion of the court.

RULE 15. Assignment of errors.—The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this court, and, on failing to do so, the case may be dismissed; but other errors may be assigned after the filing of the record, by leave of the court. The appellee, or defendant in error, shall have the right to assign cross-errors within two days after the record is filed in this court, and not afterward without special leave of the court. *The assignment of errors and cross-errors must be written upon or attached to the record.*

RULE 16. Time to plead.—In all cases in this court, where the defendant in error or appellee desires to plead

and not join in error, he shall file his plea in the office of the clerk at least five days before the cause stands for trial, and the issue thereon must be made up before the day the cause stands for trial.

RULE 17. Agreed cases.—No judgment will be pronounced in any agreed case placed upon the records of this court, unless an affidavit shall be filed, setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy between the parties, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.

RULE 18. Motions.—Motions may be made on the opening of court each day, immediately after the decisions of the court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course. Motions for orders of course will be entered by the clerk, with orders of course entered thereon, viz.: For hearing, taking under advisement, entering decisions thereon and such other matters, so that a perfect record may be kept of each step in the cause.

RULE 19. Special motions.—All special motions shall be in writing and filed with the clerk, together with the reasons in support thereof, on the day before they shall be submitted to the court. Objections to motions must also be in writing; oral arguments will not be heard.

RULE 20. When to be supported by affidavit.—When a motion is intended to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

RULE 21. Oral arguments on motions.—Oral arguments will not be heard upon any motion, nor upon the rehearing of a cause unless specially directed by the court.

RULE 22. Security for costs.—Upon filing an affidavit that any plaintiff in error is not a resident of this State, and that no bond for costs has been filed, a rule shall be entered against him, of which he shall take notice, to show cause why the writ shall not be dismissed.

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RULE 23. Abstracts.—In all cases, the party bringing a cause into this court, shall furnish a complete abstract or abridgment of the record therein, referring to appropriate pages of the record by numerals on the margin, and shall cause such abstracts to be printed in a neat and workman-like manner, with small pica type and leaded lines, on one side only, upon white paper; *such abstracts shall be bound in book or pamphlet form.* Five copies of such printed abstracts shall be filed in each case—one for each of the judges, one for the defendant in error or appellee, and one to be filed with the record, and in addition thereto, one copy of each [such] abstract shall, as soon as printed, be delivered or sent by mail, properly addressed, to the opposite counsel, and proof thereof shall be made and filed, either by the receipt of such counsel or by affidavit of the fact.

RULE 24. Further abstracts.—The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to furnish such further abstract as he shall deem necessary to a full understanding of the merits of the case.

Costs of.—Upon printed abstracts being furnished, in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of twenty cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs, to be recovered by the successful party furnishing the same.

RULE 25. Briefs.—Printed briefs will be required in all cases, whether argued orally, in full or in part only, or when submitted on briefs without oral argument. The briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, counsel will be required not only to give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments

in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed. The brief of appellant or plaintiff in error shall contain in the beginning a concise statement of the case, including in a general way the form of action, the substance of the pleadings without detail, the substance of the evidence, omitting names of witnesses and all other details, the judgment and the rulings of the trial court complained of. Such statement will be deemed correct, except in so far as the opposite party may indicate by a separate statement of his own, to be contained in his brief. Briefs shall be in book or pamphlet form.

RULE 26. Number of copies to be filed.—Five copies of the brief must be filed in each case, one for each of the judges, one for the opposite party, and one to be filed with the record, and in addition thereto, one copy of such brief shall be supplied to the opposite counsel as and in the manner provided by Rule 23, and proof thereof made and filed.

RULE 27. Docketing and hearing.—Causes in which the people are a party, and in which they have a direct interest in the decision, shall be placed at the head of the docket; all other cases shall be docketed and called for argument in the order in which the records shall have been filed with the clerk.

RULE 28. Call of docket—Expiration of rules.—The Civil Docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless, for good cause shown, they be placed at the foot of the docket; all unexpired rules will terminate upon the call of the cause for hearing: *Provided*, that if the court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.

RULE 29. Call of docket—Filing abstracts and briefs.—Hereafter the docket shall be called and abstracts and briefs filed, as follows:

1st. All cases continued from a former term shall be subject to call at the rate of twenty cases per day on and after the first day of the term.

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2d. The call of other cases on the docket will begin on the third day of the term, at the rate of twenty per day, and in such cases the abstracts and briefs of appellant or plaintiff in error must be filed in the clerk's office on or before the time required for filing the transcript of the record. The appellee or defendant in error shall file his brief within ten days thereafter, and the reply briefs thereto shall be filed within five days after such time, unless the time for filing such abstracts and briefs shall, for good cause shown, be extended.

3d. In other cases coming under Section 72 of the Practice Act, the rule last above mentioned shall apply to the filing of abstracts and briefs, and such cases shall be subject to call as soon as records are filed.

RULE 30. Failure to file abstracts or briefs.—If the plaintiff in error or appellant shall fail to file either his abstracts or briefs with the clerk within the time prescribed by the rules of this court, the judgment or decree of the court below will be affirmed on the call of the docket, unless the time for filing the same shall be extended for cause shown.

RULE 31. Briefs and abstracts.—If the defendant in error or appellee shall fail to file his brief in compliance with these rules, the judgment or decree will be reversed *pro forma*, unless the court, on examination of the record, shall deem it proper to decide the case on its merits.

RULE 32. Oral arguments.—On the calling of a case for hearing, it may be argued orally, *unless by order of the court the argument is set for another day*, if the rules for filing abstracts and briefs have been complied with, or the case may be submitted on such abstracts and briefs, and the cause, in either case, shall then be taken for final determination; but in case the appellant or plaintiff in error does not argue the cause orally, he shall be allowed three days, after the call, to file a brief in reply.

RULE 33. Time allowed for.—The time allowed for each oral argument shall be restricted to one hour, on each side, unless otherwise specially permitted.

RULE 34. Damages on dismissing appeals.—When appeals from decrees, judgments or orders for the recovery of money, are dismissed by this court for want of prosecution, or for failing to file authenticated copies of records, as required by law, the court will award damages against the appellant, at ten per cent upon the amount recovered in the court below, if it be less than one hundred dollars, and at five per cent upon the amount of such recovery, if it equals or exceeds that sum.

RULE 35. Rehearing.—Application for a rehearing of any case shall be made by petition to the court signed by counsel, briefly stating the grounds for a rehearing, and the authorities relied on in support thereof. When a rehearing is granted, the clerk shall at once give notice to the opposite party of the date when such rehearing was granted.

RULE 36. Manner of applying for a rehearing.—The manner of applying for a rehearing shall be as follows:

Within fifteen days after a decision is announced a party applying for a rehearing shall give actual notice in writing to the opposite party, or his attorney, of his intention to make such application, and shall also, within the same time, file a copy of such notice with the clerk of the court, and within thirty days after the decision is announced shall place on file in the clerk's office five printed copies of his petition. Petitions for rehearing will be entertained in that class of cases only in which the decision of this court can not be reviewed by the Supreme Court, unless this court, in the exercise of its discretion, shall, in exceptional cases, determine to the contrary. When, in any case, a rehearing is granted, it shall be placed for hearing at the foot of the docket. The petition for rehearing shall stand as the printed arguments, on the hearing of the party in whose favor it is granted. The opposite party shall, in all such cases, have ten days from the time of granting the rehearing to reply to the petition, and the petitioner shall have five days thereafter to file his reply thereto.

RULE 37. Supersedeas in vacation.—Any two of the justices of this court may in vacation issue an order which

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shall operate as a supersedeas in any case which has been submitted to this court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

RULE 38. Stay of proceedings.—Where a decision in any case is rendered in vacation, and a petition for rehearing shall be presented to either of the justices of this court, if he shall certify that there are probable grounds for granting a rehearing, all further proceedings, authorized by the judgment of this court, shall be stayed until the next term thereof.

RULE 39. Appeals and writs of error.—In all cases where an application is made in vacation for an appeal from this court to the Supreme Court, the party making such application shall present, to one of the judges of this court, a brief statement in writing, giving the title of the cause, the nature and amount of the judgment, order or decree from which the appeal is desired, the date of the rendition of such judgment, order or decree, and the name of the security proposed, accompanied with an affidavit showing the solvency and sufficiency of the security so proposed. When the application is made to the court in term time the same statement and affidavit will be required.

RULE 40. Executions—Procedendos.—Executions may issue from this court on judgments affirmed, or a writ of procedendo shall issue upon the payment of costs made in this court by the successful party.

RULE 41. Admission to practice law.—The examination of applicants for license to practice law will be made on the second day of each term of this court. The rules of the Supreme Court are referred to as to the requirements for admission to practice law in this State.

RULE 42. Same.—Each applicant for examination to be admitted to the bar, may be permitted, after the examination is over, to withdraw his certificate of good moral character and affidavit showing that he is over twenty-one years of age and a citizen of this State, for the purpose of presenting the same to the Supreme Court with his certificate of examination.

SECOND DISTRICT.

Amended Rules.

At the May term of the Appellate Court for the Second District, rules twenty-two and thirty-three were amended to read as follows: (For original rules see Vol. 66, pages 687, 690.)

RULE 22. Briefs.—Printed briefs will be required from each party even if the case is to be argued orally. The brief of appellant or plaintiff in error shall open with a concise statement of the case without argument, giving the form of action, the substance of the pleadings without detail, the substance of the material facts upon which there is proof but without detail, the points complained of in the judgment or decree; in other words, a sufficient history of the case to enable the court to see what is submitted for decision. Appellee or defendant in error may open his brief with a statement showing only wherein the first statement is wrong or incomplete, but without repetition of the former statement; if appellee or defendant in error makes no opening statement in his brief he will be understood to accept the statement of appellant or plaintiff in error as correct. Each brief shall then state concisely the points claimed by said party, and the authorities relied upon by him to sustain them, without argument. This may be followed by such argument as counsel desire to present. Give names of the parties in cases cited from the reports, as well as the volume and page. Personal reflections upon the court below, unkind remarks and epithets concerning opposing counsel, and unnecessary vilification of the opposite party and witnesses, must not appear in any brief or argument. Briefs and abstracts must be signed by counsel filing the same.

RULE 33. Petitions for rehearing.—Petitions for rehearing shall state briefly the reasons therefor, and the authorities relied upon. The opposite party shall have five days in which to file a brief in reply to the petition, without repetition of what is contained in former briefs. If rehearing be granted, the case shall be taken on call at the close of the call of the general docket.

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